95-1081

No. _____

In The

Supreme Court of the United States

October Term, 1995

INGALLS SHIPBUILDING, INC. AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, IN LIQUIDATION, BY AND THROUGH THE MISSISSIPPI INSURANCE GUARANTY ASSOCIATION,

Petitioners,

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, AND MAGGIE YATES (Widow of Jefferson Yates),

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fifth Circuit err in failing to follow the holding of the United States Court of Appeals for the Ninth Circuit in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir. 1993); *cert. denied*, ___ U.S. ___, 114 S.Ct. 2705, 129 L. Ed. 2d 833 (1994), when the Fifth Circuit held that a potential widow is not a "person entitled to compensation" when she enters into a third party settlement of her potential wrongful death cause of action, without the consent of the employer and carrier, prior to the death of her husband pursuant to § 33(g) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*?

2. Did the United States Court of Appeals for the Fifth Circuit err in concluding, contrary to the ruling of the United States Court of Appeals for the Fourth Circuit in *I.T.O. Corp. of Baltimore v. Benefits Review Board*, 542 F.2d 903 (4th Cir. 1976) (*en banc*), *vacated sub nom. Adkins v. I.T.O. Corp. of Baltimore*, 433 U.S. 904, 97 S.Ct. 2967, 53 L. Ed. 2d 1088 (1977), *reaffirmed en banc, I.T.O. Corp. of Baltimore v. Benefits Review Board*, 563 F.2d 646 (4th Cir. 1977), that the Director of the Office of Workers' Compensation Programs, U.S. Department of Labor, has standing to actively respond to the employer and carrier's appeal of a ruling in a case in which the Director has no interest?

3. Does § 33(f) of the Longshore and Harbor Workers' Compensation Act allow the employer and carrier to set off or reduce their liability for death benefits by amounts received by the non-dependent heirs-at-law from third party defendants?

QUESTIONS PRESENTED – Continued

4. Did the United States Court of Appeals for the Fifth Circuit err in failing to adopt the Administrative Law Judge's decision that contractual and legally enforceable bases existed which allowed the employer and carrier to set off their liability to the widow under the Longshore and Harbor Workers' Compensation Act in the amount of the third party recoveries received by both the widow and non-dependent heirs-at-law?

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PETITION FOR WRIT OF CERTIORARI

COME NOW, the Petitioners, Ingalls Shipbuilding, Inc.,[1] and American Mutual Liability Insurance Company, in liquidation, by and through the Mississippi Insurance Guaranty Association (hereinafter collectively "Ingalls"), and pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this matter on October 3, 1995.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit, upon which certiorari is requested, was entered on October 3, 1995, is reported at 65 F.3d 460, and is reprinted herein at App. 1-17. Petitioners' Suggestion for Rehearing *En Banc* of said decision was denied on November 22, 1995. (App. 18-19) The Fifth Circuit's October 3, 1995, decision affirms the majority decision of the Benefits Review Board in *Yates v. Ingalls Shipbuilding, Inc.*, 28 BRBS 137 (1994), reprinted herein at App. 20-55. The Benefits Review Board's decision affirmed in part and reversed in part the decision of the Administrative Law Judge in *Yates v. Ingalls Shipbuilding, Inc.*, 26 BRBS 174 (ALJ) (1992), which is reprinted herein at App. 56-88.

[1] Ingalls Shipbuilding, Inc., is a subsidiary of Litton Industries, Inc.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 3, 1995. As this Petition is filed within 90 days of that judgment, it is timely. U.S. Supreme Court Rule 13.1. Jurisdiction of this Court to review the decision of the Court of Appeals for the Fifth Circuit is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The instant matter involves interpretations of the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. § 901, *et seq*. The specific portions of the LHWCA which are pertinent to the instant matter involve 33 U.S.C. § 933(f) and 33 U.S.C. § 933(g), which are reprinted herein at App. 89-90.

STATEMENT OF THE CASE

The decedent, Jefferson Yates, was allegedly exposed to asbestos in the course and scope of his employment with Ingalls Shipbuilding, Inc.[2] On March 23, 1981, he was diagnosed as having an asbestos-related disease. On April 16, 1981, he filed a claim for compensation against

[2] The workers' compensation carrier for co-petitioner Ingalls was American Mutual Liability Insurance Company, which is now in receivership. Its obligations for payment of benefits under the LHWCA have been assumed by the other co-petitioner herein, The Mississippi Insurance Guaranty Association.

Ingalls under the LHWCA. On May 26, 1981, his attorneys, on his behalf, filed a lawsuit in the United States District Court, for the Southern District of Mississippi, Southern Division, against the 23 manufacturers of asbestos products to which the decedent was allegedly exposed at Ingalls.

Between May 1981 and January 1984, Mr. and Mrs. Yates, while being represented by the same attorneys who represented Mr. Yates in his LHWCA claim against Ingalls, entered into eight settlements with certain asbestos manufacturers without the consent of Ingalls. Mr. and Mrs. Yates executed releases in conjunction with the third party settlements. In six of the eight settlements which were not approved by the employer and carrier in accordance with § 33(g) of the LHWCA, Mrs. Yates released any future claim she may have had for the wrongful death of her husband.

Mr. Yates died of his asbestos-related condition on January 28, 1986. On April 22, 1986, Mrs. Yates, respondent herein, filed a compensation claim for death benefits against Ingalls under § 909 of the LHWCA. Mrs. Yates and her six adult children, represented by the same attorneys who represented her in her LHWCA claim against Ingalls, continued to pursue settlements against third party defendants as a result of the decedent's injury and/or wrongful death. They settled with third party defendants Raymark, Wellington, and Johns Manville after decedent's death for an average net amount of approximately $21,225.00 per settlement, which was equally divided among Mrs. Yates and her six adult children. They, likewise, executed releases forever discharging these defendants.

Also, in those settlements, Mrs. Yates and her adult children agreed that Ingalls would be entitled to a credit or offset in the entire amount of all sums received from the third party defendants. For example, the release executed in favor of Wellington in exchange for the sum of $60,000.00, specifically stated:

> The *undersigned* do hereby represent and warrant to releasees that whether there is now pending any claim for workers' compensation benefits under state or federal law or statute, or if any such claims shall hereafter be filed and be successful and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to *either of the undersigned* shall first be given credit *for the consideration paid to the undersigned under this agreement*, less reasonable cost of collection and *shall make no payment of any compensation benefits to the undersigned until the consideration paid to the undersigned under this agreement is exhausted*. (emphasis added.)

The release executed in favor of third party defendant Raymark Industries, Inc. contained similar language.

In addition to the release executed in the Wellington settlement, an order was entered by the United States District Court for the Southern District of Mississippi, Southern Division, approving the third party settlement, in which the court stated:

> (2) That the aforesaid settlement be, and it is hereby approved, providing, however, that in

> *any claim pending or hereafter filed by the plaintiff*, the decedent's heirs or anyone in privity with them under the Mississippi Workers' Compensation Act, the Longshoreman and Harbor Workers' Act, or any other law which provides benefits to be paid to the plaintiff or the other "wrongful death" beneficiaries of Jefferson T. Yates, deceased, arising out of Jefferson T. Yates, deceased's employment, and any such employer or its insurance carrier be ordered to pay such benefits as a result of any matter, fact, or thing appearing in the complaint filed in this cause, then, pursuant to the applicable compensation act, such employer and/or insurance carrier *shall first be given credit for the net amount of the aforesaid sum accruing to the plaintiff and the other "wrongful death" beneficiaries of Jefferson T. Yates, deceased*. (emphasis added.)

Based on the Yates' representations in the settlement papers, the court order and on the LS-33 forms[3] which stated that Ingalls would be entitled to a credit in the full amount paid by the settling defendants to all plaintiffs, Ingalls approved these post-death third party settlements for an average amount much greater than the settlements consummated prior to decedent's death.

Ingalls subsequently controverted the LHWCA death claim of Mrs. Yates because she failed to obtain the consent of Ingalls to the eight third party settlements entered

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[3] Section 33(g) provides in part that an employer's approval of any third party settlement "shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner . . . " *See also* 20 C.F.R. § 702.281(b). The referenced form from the Department of Labor is designated as an LS-33 Form.

into by her and her husband before his death. Alternatively, Ingalls asserted that it was entitled, as a matter of law, to set off its liability, if any, to Mrs. Yates, by all net amounts paid by the third party asbestos manufacturers after the death of Mr. Yates. Finally, Ingalls asserted that the third party releases, the court order, and the LS-33 forms gave Ingalls contractual and legally enforceable bases to set off or reduce its liability under the LHWCA by the net amount received by Mrs. Yates and her adult children from the third party asbestos manufacturers.

The Decision of the Administrative Law Judge

On April 23, 1992, the Administrative Law Judge under the LHWCA entered his order finding that the widow's claim of Mrs. Yates for death benefits against Ingalls was not barred by her unapproved third party settlements prior to decedent's death as he concluded that Mrs. Yates was not a "person entitled to compensation" under § 33(g) of the LHWCA at the time of the settlements. (App. 71) The ALJ also held that although the LHWCA did not require that Ingalls receive a set-off or reduction of its compensation liability under the LHWCA by amounts received by Mrs. Yates and her adult children in the third party litigation, in this particular case, they had contractually agreed in the releases to allow Ingalls such a set-off. Accordingly, the ALJ, citing *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir. 1987), *cert. denied*, 484 U.S. 976 (1987), found that Ingalls was entitled to such a set-off. (App. 84-86)

The Decision of the Benefits Review Board

On June 29, 1994, the Benefits Review Board entered its decision based upon the claimant's appeal and Ingalls' cross-appeal of the Administrative Law Judge's decision. (App. 20-55) The Benefits Review Board affirmed the Administrative Law Judge's holdings that the widow's claim was not barred pursuant to § 33(g), and that the LHWCA did not allow an employer a credit for amounts received in third party litigation by non-dependent heirs-at-law. (App. 36-37, 42) The Board, however, with one dissent, reversed the Administrative Law Judge's holding that there was a contractual basis for granting Ingalls a credit for amounts received by both the widow and her adult children from the third party defendants. (App. 43-45, 53-55)

The Decision of the U.S. Court of Appeals for the Fifth Circuit

Ingalls appealed the Benefits Review Board's decision to the U.S. Court of Appeals for the Fifth Circuit, pursuant to 33 U.S.C. § 921(c). On October 3, 1995, the Fifth Circuit rendered its decision affirming the decision of the Benefits Review Board. (App. 1-17) In its decision, a panel of the Fifth Circuit, citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 120 L. Ed. 2d 379 (1992), held that a wife's claim for death benefits under the LHWCA did not vest until the employee's death, and thus she was not a "person entitled to compensation" who must comply with the terms of § 33(g) until after the decedent's death. (App. 9-11) In reliance on interpretations of § 33(f) in the Ninth and Fourth Circuits,

the Fifth Circuit held that Ingalls was only entitled to offset its liability under the LHWCA by amounts received by Mrs. Yates and not by the full net amount paid by the third party defendants. (App. 12-13) Next, the panel held that the releases signed by Mrs. Yates and her adult children did not "clearly and unambiguously" allow Ingalls to offset its liability for death benefits by third party amounts received by the children. (App. 14-16) Finally, the panel held that the Director, Office of Workers' Compensation Programs, U.S. Department of Labor, had standing to participate in this appeal as a respondent pursuant to *Ingalls Shipbuilding, Div. Litton Systems, Inc. v. White*, 681 F.2d 275 (5th Cir. 1982), reversed on other grounds, *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir. 1984), *cert. denied*, 469 U.S. 818 (1984), which the panel held was unaffected by the U.S. Supreme Court's recent decision in *Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. ___, 115 S.Ct. 1278, 131 L. Ed. 2d 160 (1995), which denied standing of the Director to appeal a claim in which it had no cognizable interest. (App. 6)

It is from the decision of the Court of Appeals for the Fifth Circuit that Ingalls seeks a writ of certiorari from this Court.

ARGUMENT

1. DID THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR IN FAILING TO FOLLOW THE HOLDING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN *CRETAN V. BETHLEHEM STEEL CORP.*, 1 F.3d 843 (9TH CIR. 1993); *CERT. DENIED*, ___ U.S. ___, 114 S.CT. 2705, 129 L. Ed. 2d 833 (1994), WHEN THE FIFTH CIRCUIT HELD THAT A POTENTIAL WIDOW IS NOT A "PERSON ENTITLED TO COMPENSATION" WHEN SHE ENTERS INTO A THIRD PARTY SETTLEMENT OF HER POTENTIAL WRONGFUL DEATH CAUSE OF ACTION, WITHOUT THE CONSENT OF THE EMPLOYER AND CARRIER, PRIOR TO THE DEATH OF HER HUSBAND PURSUANT TO § 33(G) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. § 901 *ET SEQ.*?

Before his death, Mr. and Mrs. Yates entered into eight third party settlements without the consent of Ingalls. In six of them, Mrs. Yates released all future claims she might have had for the wrongful death of her husband. By entering into these third party settlements without Ingalls' consent pursuant to § 33(g) of the LHWCA, Mrs. Yates effectively terminated Ingalls' inviolate lien rights under the LHWCA to obtain reimbursement from those asbestos manufacturers when she later sought compensation benefits against Ingalls for the subsequent death of her husband. In other words, with the release by Mrs. Yates of her future claims for the wrongful death of her husband, the potential subrogation claims of Ingalls under the LHWCA against the third party asbestos manufacturers for his death were also

extinguished. *See, e.g., Peters v. North River Insurance Co. of Morristown, NJ,* 764 F.2d 306 (5th Cir. 1985). Notwithstanding the prejudicial effect of these unapproved settlements on Ingalls, the Fifth Circuit held that Mrs. Yates was not a "person entitled to compensation" under § 33(g) of the LHWCA when she entered into the third party settlements, and therefore, she had no obligation to obtain the consent of Ingalls to the six third party settlements which released her future claims for the wrongful death of her husband. (App. 9-11)

The decision of the Fifth Circuit in this case is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit concerning the same issue. *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2705, 129 L. Ed. 2d 833 (1994). (App. 91-100) Consequently, because of this split among the Circuits, there are special and important reasons for this Court to grant Ingalls' Petition for a Writ of Certiorari herein.

In reaching their conflicting rulings on the issue of whether a potential widow must comply with § 33(g) of the LHWCA, both the Fifth and Ninth Circuits relied heavily upon this Court's decision in *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 120 L. Ed. 2d 379 (1992). (App. 101-142) In *Cowart*, this Court found that an injured employee became a person entitled to compensation at the time of the injury rather than the later date upon which an employer may admit liability. In reaching its decision, this Court noted that Cowart became a person entitled to compensation "at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen." 120 L. Ed. 2d at p.

390. (App. 109) In strictly interpreting the statute to bar the recovery by the claimant in *Cowart* for not obtaining his employer's approval to a third party settlement, this Court noted that its interpretation of the statute comported with the purpose and structure of § 33. *Id.* at 393. (App. 116)

Factually, the *Cowart* decision did not deal with whether a wife can pursue LHWCA death benefits against an employer following the death of her husband after both she and her husband entered into unapproved third party settlements during his life. This exact issue, however, was faced and directly addressed by the Ninth Circuit in the case of *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2705, 129 L. Ed. 2d 833 (1994). In *Cretan*, as in the case at bar, an injured shipyard worker and his wife entered into third party settlements prior to his asbestos-related death. Those settlements, like the settlements in the instant claim, included not only the wife's loss of consortium claims but also her potential wrongful death claims. Mr. and Mrs. Cretan, like Mr. and Mrs. Yates in the present case, did not obtain the employer's written consent to the third party settlements. Under those circumstances, the Ninth Circuit held that the wife's subsequent LHWCA claim for death benefits was barred because she entered into the unapproved third party settlements prior to her husband's death. 1 F.3d 843 (9th Cir. 1993)

The Ninth Circuit in *Cretan* also noted that considering a potential widow who prejudices the employer and carrier's subrogation rights as a "person entitled to compensation" when she entered into pre-death third party

settlements with her husband, would effectuate the purpose of both § 33(f) and § 33(g) of the LHWCA. Furthermore, the *Cretan* court cited with approval the Ninth Circuit's earlier decision in *Force v. Director, OWCP*, 938 F.2d 981 (9th Cir. 1991), which held that the phrase "person entitled to compensation" need not be fixed at any particular moment. (App. 96)

In consideration of the language of § 33 and its purpose of protecting employers against improvident third party settlements by employees, it is submitted that this Court should adopt the reasoning of *Cretan* and reject that of *Yates* in order to resolve the split between the Ninth Circuit and the Fifth Circuit on this issue.

First, the language of § 33(g) of the LHWCA supports the *Cretan* result and provides as follows, to-wit:

> (g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) *would be* entitled under this Act, the employer shall be liable for compensation as determined under § (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative.) . . .

33 U.S.C. § 933(g) (emphasis added) (App. 89-90)

Thus, by making itself applicable to what the claimant "would be" entitled to under the Act, the statute itself encompasses a forward looking concept which should

apply to the actions of a potential widow. *See Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981).

Additionally, the underlying purpose of § 33 is to place liability on the third party entity who ultimately caused the employee's harm, and thereby protect the employer who is subject to absolute liability irrespective of fault under the Act. 33 U.S.C. § 904(b); *Peters v. North River Insurance Co. of Morristown, NJ, supra*, 764 F.2d at 310. Because of an employer's absolute liability under the Act, § 33(g) was incorporated into the LHWCA for the express purpose of preventing a claimant from prejudicing the subrogation rights, past and future, of the employer, by accepting too little for his cause of action against a third party. *I.T.O. Corp. of Baltimore v. Selman*, 954 F.2d 239, 242 (4th Cir. 1992); *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459, 467, 88 S.Ct. 1140, 1145, 20 L. Ed. 2d 30, 36 (1968). Consequently, where a potential widow's actions prejudice the rights of the employer and carrier, she should be subject to the same obligations as a widow in order to effectuate the purpose of the statute.

Furthermore, the decision of the Fifth Circuit in this case overlooks the fact that many aspects of a death claim vest at the time of the worker's injury. For example, the responsible employer and/or carrier is determined at the time of injury. *The Travelers Insurance Co. v. Marshall*, 634 F.2d 843 (5th Cir. 1981). Likewise, questions of dependency are determined at the time of injury, as opposed to the time of death. 33 U.S.C. § 909(f). Moreover, Mrs. Yates assumed the status of a widow by releasing her future rights to make a claim for the death of her husband in order to obtain the benefit of the unapproved third party settlements even before her husband's death. Consequently, by gaining the benefits the status conferred, she

should not be allowed to avoid the concomitant burden of being considered to already have a vested claim. *See Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992). Therefore, a potential widow's claim vests at the time of her husband's injury, as opposed to the time of his death. This is so because without her husband's injury, which led to his death, there could be no claim for death benefits, 33 U.S.C. § 909, and no claim for third party tort or wrongful death relief.

The decision of the Fifth Circuit in the present case created a split in the circuits as to whether § 33(g) applies to a potential widow, and results in an interpretation of the statute which is contrary to its language and purpose. Additionally, the Fifth Circuit's decision fails to consider that the claimant assumed the position of a widow before her husband's death in order to collect potential wrongful death benefits in her third party settlements. She should not be able to assume that position when it favors her, but to disregard it when it does not.

Further, by way of analogy, if an employee is injured at work but does not initially miss work due to the injury, he may not be entitled to *receive* compensation. It could hardly be argued, however, that if that employee pursues a third party action for tort benefits due to the injury, he is not "a person *entitled* to compensation" under § 33(g) (emphasis added). The employee's entitlement to compensation, per *Cowart*, accrues when he was injured, regardless of whether the employer has paid or recognized the employee's entitlement to compensation. Likewise, where an employee is injured at work in such a way that the injury may lead to the employee's death, the fact that the spouse of the employee is not yet receiving

compensation while the employee is alive does not mean that she loses her status as a "person *entitled* to compensation" (emphasis added). Surely, a spouse seeking death benefits under the LHWCA should not be granted any greater rights under § 33(g) than the injured and deceased employee would have had, had he lived and consummated unapproved third party settlements.

Considering the split in authority between the Fifth and Ninth Circuits, this Court should grant this Petition and issue a writ of certiorari to the U. S. Court of Appeals for the Fifth Circuit in order to settle this unresolved area of the law.

2. **DID THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR IN CONCLUDING, CONTRARY TO THE RULING OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN *I.T.O. CORP. OF BALTIMORE V. BENEFITS REVIEW BOARD*, 542 F.2d 903 (4th CIR. 1976) (*EN BANC*), *VACATED SUB NOM. ADKINS V. I.T.O. CORP. OF BALTIMORE*, 433 U.S. 904, 97 S.CT. 2967, 53 L. Ed. 2d 1088 (1977), *REAFFIRMED EN BANC, I.T.O. CORP. OF BALTIMORE V. BENEFITS REVIEW BOARD*, 563 F.2d 646 (4th CIR. 1977), THAT THE DIRECTOR OF THE OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, HAS STANDING TO ACTIVELY RESPOND TO THE EMPLOYER AND CARRIER'S APPEAL OF A RULING IN A CASE IN WHICH THE DIRECTOR HAS NO INTEREST?**

Notwithstanding the lack of a financial stake in the outcome of this matter, the able legal representation of claimant in this adversarial proceeding, and the fact that

the outcome of this case has no bearing on the responsibilities conferred on the Director of the Office of Workers' Compensation Programs, U.S. Department of Labor (hereinafter "Director") by the LHWCA, the Director has interjected himself into this claim as an advocate for Mrs. Yates.

Over petitioners' objection, the Fifth Circuit ruled in the instant claim that the Director had standing to appear as a respondent in light of *Ingalls Shipbuilding, Div. Litton Systems, Inc. v. White*, 681 F.2d 275 (1982), reversed on other grounds; *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, *cert. denied*, 469 U.S. 818 (1984). In *White*, the Fifth Circuit held that the Director had standing to respond even without an economic interest in the outcome of the case, based on Rule 15(a) of the Federal Rules of Appellate Procedure. *White, cited supra*, at 282. (App. 143-180)

However, the Fifth Circuit's decision in the instant claim is in conflict with the decision of the Court of Appeals for the Fourth Circuit in *I.T.O. Corp. of Baltimore v. Benefits Review Board*, 542 F.2d 903 (4th Cir. 1976) (*en banc*), *vacated sub nom. Adkins v. I.T.O. Corp. of Baltimore*, 433 U.S. 904, 97 S.Ct. 2967, 53 L. Ed. 2d 1088 (1977), *reaffirmed en banc, I.T.O. Corp. of Baltimore v. Benefits Review Board*, 563 F.2d 646 (4th Cir. 1977). In that case, the Fourth Circuit held that "to be a party [respondent] before this court, the Director must have some concrete stake in the outcome of the case." *Id.*, 542 F.2d at 907. (*See* App. 181-197)

This Court has recently decided that the Director does not have standing to petition the Court of Appeals

for reversal of a Benefits Review Board decision in which it has no statutorily conferred interest. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. ___, 115 S.Ct. 1278, 131 L. Ed. 2d 160 (1995). (App. 198-224) However, in a footnote, this Court stated that its opinion in that case, " . . . intimates no view on the party-respondent question." 131 L. Ed. 2d at 168, n.2. There being no statutorily conferred stake of the Director involved here, Rule 15(a) of the Federal Rules of Appellate Procedure should not grant standing where the interests necessary for standing as articulated in *Newport News* are not present.

Consequently, the petitioners herein would assert that the conflict between the Fifth and Fourth Circuits in the instant claim presents this Court with the issue of the Director's standing to actively participate as a respondent, which was left unresolved in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., cited supra.*

3. DOES § 33(F) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT ALLOW THE EMPLOYER AND CARRIER TO SET OFF OR REDUCE THEIR LIABILITY FOR DEATH BENEFITS BY AMOUNTS RECEIVED BY THE NON-DEPENDENT HEIRS-AT-LAW FROM THIRD PARTY DEFENDANTS?

In the instant claim, Mrs. Yates and her adult children have entered into three settlements after the decedent's death on January 28, 1986. These three settlements are in the gross amount of $105,821.00, and the net amount of $66,150.00. Pursuant to the decision of the Fifth Circuit, Ingalls is only entitled to one-seventh of the

net amount (the amount received by Mrs. Yates), or $9,450.00, as its total setoff of liability for death benefits, but is not entitled to any share received by the adult Yates children.

The decision of the Fifth Circuit is a departure from established law regarding the inviolability of the LHWCA lien of the employer and carrier for benefits paid and the high priority of reimbursement under § 33(f) to an employer out of third party recoveries. For example, in *Peters v. North River Insurance Co. of Morristown, NJ*, 764 F.2d 306 (5th Cir. 1985), the Fifth Circuit held "that Congress is aware that the courts have recognized a compensation lien on third party recoveries and, indeed, intends for the lien to 'remain[] inviolable, consistent with *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 . . . .'." *Peters*, 764 F.2d at 312. (Citation omitted.) That court further recognized that "the right to reimbursement attaches to the proceeds of a judgment . . . or to the proceeds of a compromise agreement. . . ." *Id. Peters* went on to state the priority of disbursements from a judgment or settlement, with attorney fees deducted first, the employer's lien second, and any remainder payable to the plaintiff. *Id. See* also *Ochoa v. Employer National Insurance Co.*, 724 F.2d 1171 (5th Cir. 1984), upon rehearing, 754 F.2d 1196, 1198 (5th Cir. 1985).

As noted above, for widows' claims and recoveries, the Fifth Circuit's decision in effect realigns or reorganizes this lien disbursement precedent and narrows the reach of the lien's attachment. Section 33(f) of the LHWCA states that an employer is only to pay compensation to a claimant that exceeds "the net amount recovered against such third persons." 33 U.S.C. § 933(f). For

example, if a claimant recovers from a third party, his attorney first deducts his fees and expenses, then the employer's lien is satisfied, and finally, any remainder goes to the claimant. However, pursuant to the Fifth Circuit's decision, when a widow is involved, her attorney gets his fee and expenses first, then the wrongful death beneficiaries receive their share pursuant to state law, and then the employer's lien attaches to just the widow's share. Changing the scenario in this fashion lets state law preempt federal law and reorganizes lien priorities in contravention of the employer's lien inviolability. *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74; 100 S.Ct. 925; 63 L. Ed. 2d 215 (1980), *Peters v. North River Insurance Co. of Morristown, NJ*, 764 F.2d 306 (5th Cir. 1985), *Bartholomew v. CNG Producing Co.*, 862 F.2d 555 (5th Cir. 1989).

Under the ruling of the Fifth Circuit in the instant claim, the lien of the employer is not satisfied from the amount "recovered against third persons", or from the "proceeds of judgment . . . or from the proceeds of a compromise agreement", but instead attaches to only the share the widow actually receives, even though her share may be merely a fraction of the amount "recovered against such third parties." Thus, the Fifth Circuit's decision is contrary to the LHWCA and established law.

Furthermore, the decision of the Fifth Circuit is contrary to the language and purpose of the statute. Section 33(f) provides as follows, to-wit:

> If the person entitled to compensation institutes proceedings within the period prescribed in § 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the

> excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered *against such third persons*. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorney fees). (Emphasis added.)

33 U.S.C. § 933(f). (App. 89)

From the statutory context, it is obvious that the net amount is the amount recovered *from* the third person and not the amount recovered and received *by* the claimant (emphasis added). Where the plain language of a statute is unambiguous, judicial inquiry is complete. *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033 (5th Cir. 1990). Furthermore, the plain wording of a statute may not be disregarded under the guise of interpreting it liberally. *Maryland Shipbuilding and Drydock Co. v. Jenkins*, 594 F.2d 404 (4th Cir. 1979). Consequently, consideration of who gets what out of a third party settlement is irrelevant. The key inquiry is how much did the third party defendant pay as a result of the injury or death. Therefore, the Fifth Circuit's allowance of a set off or lien reimbursement only in the amount received by the widow and not the amount received from the third parties is contrary to the language of the statute.

Furthermore, the ruling by the Fifth Circuit is contrary to the purpose of § 33 of the LHWCA, which is to place liability for the injury on the third party who caused the injury and, thereby, make the employer whole by way of subrogation for the amounts the employer had to pay the worker (or in this case, his widow) under the

LHWCA on account of such injury, *Peters v. North River Insurance Co. of Morristown, NJ*, 764 F.2d 306, 310 (5th Cir. 1985); *Louviere v. Shell Oil Co.*, 509 F.2d 278, 283 (5th Cir. 1975), *cert. denied*, 423 U.S. 1078, 96 S.Ct. 867, 47 L. Ed. 2d 90 (1976); *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 324, 84 S.Ct. 748, 754, 11 L. Ed. 2d 732 (1964); and to prevent double recoveries under the LHWCA. *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74; 100 S.Ct. 925; 63 L. Ed. 2d 215 (1980). This is so because the employer is strictly liable irrespective of fault to pay benefits under the LHWCA. 33 U.S.C. § 904(b). The Fifth Circuit's ruling in effect places a widow in a better position than her deceased husband would have been if he had settled without Ingalls' consent. Had he lived, Mr. Yates would have had to reimburse Ingalls for its lien, following the payment of his attorney's fees, out of the recovery from the third parties. He could not claim any reduction in Ingalls' lien by arguing that the recovery is to be split in accordance with the Mississippi Wrongful Death Statute. MISS. CODE ANN. § 11-7-13 (1994 Supp.)

The Fifth Circuit's ruling would work contrary to the recognized purposes of § 33(f). First, the Fifth Circuit's ruling that the employer's subrogation interest should be significantly reduced by not allowing a credit under § 33(f) for recoveries by non-dependent heirs at law effectively leaves the employer with substantial exposure despite substantial payments by the third party defendants. Second, the claimant's arguments would allow double recovery by allowing the widow-claimant to have both the benefit of death benefits under the LHWCA and the benefit of allowing her family to enjoy exempt third party settlements which were unapproved by the

employer. Third, such an interpretation gives widows and non-dependent heirs-at-law greater protection and rights than the deceased employee would have had had he lived, and greater rights than even dependent children have under the LHWCA. 33 U.S.C. §§ 902(14) and 909.

Based upon the foregoing, the decision of the Fifth Circuit is a significant departure from long-standing case law recognizing the priority of the inviolate lien of the employer and carrier under § 33(f). Accordingly, Ingalls respectfully requests that this Court grant certiorari to review the Fifth Circuit's decision, which departs from established principles of law.

4. **DID THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR IN FAILING TO ADOPT THE ADMINISTRATIVE LAW JUDGE'S DECISION THAT CONTRACTUAL AND LEGALLY ENFORCEABLE BASES EXISTED WHICH ALLOWED THE EMPLOYER AND CARRIER TO SET OFF THEIR LIABILITY TO THE WIDOW UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT IN THE AMOUNT OF THE THIRD PARTY RECOVERIES RECEIVED BY BOTH THE WIDOW AND NON-DEPENDENT HEIRS-AT-LAW?**

In the instant claim, the facts indicate that Mrs. Yates and her adult children entered into settlements wherein they executed third party releases which gave Ingalls a setoff for any compensation benefits due by the total net amount received by all of them.

After discussing the conflicting language of the releases, the Administrative Law Judge ruled as follows:

> Thus, with respect to all three post-death settlements entered into by claimant and the surviving children of the decedent, it is found that claimant is contractually obligated to give employer a credit for the entire amount of the net proceeds, and not only the one-seventh she received . . . this contractual obligation is recognized in view of the holding in *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir. 1987).

(App. 86)

In a decision with three separate opinions, the majority of the Benefits Review Board reversed the Administrative Law Judge's finding of a contractual basis for allowing the employer a credit for all net third party recoveries, since it found that Ingalls was not a party to the releases. In its decision, the Fifth Circuit affirmed the Benefits Review Board for an entirely different reason, *i.e.*, it did not feel that the releases "clearly and unambiguously" required Mrs. Yates to give Ingalls a credit in excess of the sums she received. In reaching its conclusion, the Fifth Circuit erroneously substituted its interpretation of the language of the releases for that of the Administrative Law Judge. Although interpretation of an unambiguous contract is a matter of law, the interpretation of an ambiguous contract is a matter of fact. *Southern Natural Gas Co. v. Pursue Energy*, 781 F.2d 1079 (5th Cir. 1986); *Re Nevets C.M., Inc. v. Nissho Iwai American Corporation*, 726 F.Supp. 525 (D.N.J. 1989). Where there is an ambiguity in the contract, the fact-finder's interpretation

of the conflicting evidence is entitled to deference. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, ___ U.S. ___, 115 S.Ct. 1212, 131 L. Ed. 2d 76 (1995). Likewise, under the LHWCA, long-standing case law requires that the Administrative Law Judge's interpretation of conflicting evidence be given deference. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 189 (5th Cir. 1992); *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003, 1006 (5th Cir. 1978); *NLRB v. Columbian Enameling and Stamping Co.*, 306 U.S. 292, 59 S.Ct. 501, 504-505, 83 L. Ed. 660 (1939). In reviewing a matter on appeal, it is immaterial that the facts permit the drawing of different inferences or that the appellate court would have reached a different conclusion on the same facts. *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1942); *Symanowicz v. Army & Air Force Exchange Service*, 672 F.2d 638 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 376, 459 U.S. 1016, 74 L. Ed. 2d 510 (1982).

Furthermore, the Benefits Review Board and the Fifth Circuit overlooked the order entered by the United States District Court for the Southern District of Mississippi which approved the Wellington settlement. That order has been disregarded and given absolutely no force and effect.

In essence the Fifth Circuit abandoned its appellate function in order to re-weigh the evidence. This the Fifth Circuit should not have done. As such, this Court should grant certiorari to review the Fifth Circuit's authority to substitute its judgment for that of the Administrative Law Judge.

CONCLUSION

Because of the conflict between the Fifth Circuit and the Ninth Circuit as to the proper interpretation of § 33(g) of the LHWCA; the conflict between the Fifth Circuit and the Fourth Circuit as to the Director's standing as a respondent; the Fifth Circuit's departure from long-standing case law interpreting § 33(f) and employer's inviolate lien rights; and the Fifth Circuit's erroneous interpretations of the releases and court order, the petitioners herein respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Dated: December 29, 1995

INGALLS SHIPBUILDING, INC., et al., Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and Maggie Yates (Widow of Jefferson Yates), Respondents.

No. 94-40716.

United States Court of Appeals,
Fifth Circuit.

Oct. 3, 1995.

Richard P. Salloum, Paul B. Howell, Franke, Rainey & Salloum, Gulfport, MS, for petitioners.

Mark A. Reinhalter, Carol DeDeo, Associate Solicitor of Labor, U.S. Dept. of Labor, Washington, DC, for Director, Office of Workers' Compensation Programs.

Wynn E. Clark, Gulfport, MS, Ransom P. Jones, III, Pascagoula, MS, for Yates.

Paul E. Trayers, Clerk, Benefits Review Bd., Washington, DC, for other interested parties.

Petition for Review of a Final Order of the Benefits Review Board.

Before WISDOM, GARWOOD and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Ingalls Shipbuilding (Ingalls) appeals the order of the Benefits Review Board (BRB) awarding Maggie Yates

death benefits under section 9 of the Longshore and Harbor Workers Compensation Act (the "Act"), 33 U.S.C. § 909. We affirm.

I.

Jefferson Yates worked periodically as a shipfitter for Ingalls in Pascagoula, Mississippi, from 1953 until 1967, during which time he was exposed to asbestos. He worked in unrelated non-maritime employment from 1967 to 1974, when he voluntarily retired at age 67. In March 1981, he was evaluated for asbestos-related diseases and was later diagnosed as suffering from asbestosis, chronic bronchitis, and possible malignancy of the lungs. In April 1981, Mr. Yates filed a claim for disability benefits under section 8 of the Act. 33 U.S.C. § 908. In May 1981, he filed a third-party lawsuit in a Mississippi federal district court, seeking damages from twenty-three manufacturers and sellers of asbestos products to which he was exposed while employed at Ingalls.

In June 1982, Ingalls admitted the compensability of Jefferson Yates's claim for disability benefits under the Act and tendered benefits. In May 1983, Ingalls and Jefferson Yates executed a settlement agreement pursuant to 33 U.S.C. § 908(i) under which Ingalls agreed to pay Mr. Yates a lump sum payment of $15,000, give him open medical benefits, and pay his attorney's fees. Ingalls made payment consistent with a May 10, 1983 order of the deputy commissioner. Between May 1981 and January 1984, Jefferson Yates consummated settlement agreements with eight defendants in the federal court suit (the

pre-death settlements). Ingalls was not a party to the pre-death settlements, and Jefferson Yates did not obtain its approval before he made these settlements. Although Maggie Yates was not named a party plaintiff in the federal court suit, she signed releases in each of the pre-death settlements. Although some of the earlier settlements limited Maggie Yates's release to loss of consortium, other settlements foreclosed her from bringing any future tort claim for her husband's wrongful death.

On January 28, 1986, Jefferson Yates died from prostate cancer. The parties stipulated that his asbestosis contributed to his death. In addition to his wife, Jefferson Yates was survived by six non-dependent children. In April 1986, Maggie Yates filed a claim for death benefits under section 9 of the Act against Ingalls and its carrier.[1] Ingalls promptly controverted Mrs. Yates's claim.

Maggie Yates and her six non-dependent children continued Jefferson Yates's federal court suit, which was converted from a personal injury action to a wrongful death action. Thereafter, Maggie Yates and her six children entered into settlements with Raymark, et al. on June 9, 1987, for $2,821; with Wellington, et al. on April 5, 1989, for $60,000; and with Johns-Manville, et al. on March 3, 1989, for $43,000 (the post-death settlements). In accordance with section 33(g)(1), Mrs. Yates obtained Ingalls's written approval for the three post-death settlements.

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[1] None of the six children filed claims for death benefits under the Act.

Ingalls defended Ms. Yates' claim for death benefits under the Act on two fronts. It argued that Mrs. Yates' pre-death settlement with the asbestos defendants was without its approval and her claim for post-death benefits was therefore barred by § 33(g)(1) of the Act as interpreted by the Supreme Court in Estate of *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992).

Ingalls also argued that once it took credit for all the net proceeds of the post-death settlements against its potential liability to Maggie Yates for death benefits under the Act, it was mathematically impossible that it would be required to pay death benefits to Mrs. Yates.

In an April 1992 decision and order, the Administrative Law Judge (ALJ) held that, at the time of the pre-death settlements, Maggie Yates was not a person "entitled to compensation" under section 33(g)(1) and was therefore exempt from that subsection's written approval requirement. Thus, the ALJ concluded that Maggie Yates's claim for death benefits under the Act was not barred by section 33(g)(1).

Based on the Mississippi wrongful death statute and Maggie Yates's own testimony, the ALJ determined that the post-death settlements were apportioned between Maggie Yates and the six children, so that Maggie Yates only received one-seventh of the net amount. The ALJ concluded that Ingalls was only entitled to a credit for one-seventh of the post-death settlement under the Act. However, the ALJ held that, based on the terms of the post-death settlement agreements, Ingalls was contractually entitled to receive credit under section 33(f) for the

entire net amount of the post-death settlements to offset its statutory liability for death benefits. Accordingly, the ALJ awarded Maggie Yates death benefits under section 9 of the Act and held that Ingalls was entitled to a credit under section 33(f) for the entire net amount of the post-death settlements.

Maggie Yates appealed the ALJ's decision to the BRB, and Ingalls cross-appealed. The Director of the Office of Workers' Compensation Programs (Director) responded to the appeals and supported Maggie Yates's interpretations of both section 33(g)(1) and 33(f). In a June 1994 decision, the BRB affirmed the ALJ's holding that Maggie Yates's claim for death benefits was not barred by section 33(g)(1) because she was not "a person entitled to compensation" at the time of the pre-death settlements. The BRB also affirmed the ALJ's order declining to give a credit as a matter of law for settlement sums received by the Yates non-dependent children against death benefits Ingalls owed under the Act. A majority of the BRB held that no contractual basis existed for allowing the offset of the entire net amount received in the post-death settlements and reversed the ALJ on this point. One member of the three judge panel dissented, arguing that, under the terms of the post-death settlements, Maggie Yates waived her right to apportionment.

Ingalls filed a timely petition for review with this Court. The Director appeared as a respondent and filed a brief supporting Maggie Yates's interpretations of sections 33(g)(1) and 33(f). We consider below the issues presented in this appeal.

II.

A.

Ingalls argues first that § 33(g)(1) of the Act bars Mrs. Yates' claim for death benefits because she entered into third party settlements without Ingalls' approval before Mr. Yates' death.[2] This court's review of BRB decisions is limited to considering errors of law and ensuring that the BRB adhered to its statutory standard of review, namely,

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[2] Ingalls moved to strike the brief of the Director and disallow any further participation, asserting that the Director lacked standing. In *Ingalls Shipbuilding Div., Litton Systems, Inc. v. White*, 681 F.2d 275, 281-84 (5th Cir.1982), *overruled on other grounds, Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406-07 (5th Cir.) (en banc), *cert. denied*, 469 U.S. 818, 105 S.Ct. 88, 83 L.Ed.2d 35 (1984), this Court held that the Director has standing to participate as a respondent in the appeal of a BRB decision. In so holding, the court in *White* rejected the line of cases relied on by Ingalls in this appeal, namely, the Fourth Circuit's rule that the Director must show a stake in the outcome of the controversy in order to respond to a petition for review under 33 U.S.C. § 921(c). *White*, 681 F.2d at 281. In *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, ___ U.S. ___, 115 S.Ct. 1278, 131 L.Ed.2d 160 (1995), the Supreme Court held that the Director had no standing to petition the court of appeals seeking reversal of a BRB decision. *Id.* at ___, 115 S.Ct. at 1288. The Court in *Newport News Shipbuilding* differentiated an agency's entitlement to party-respondent status from its standing to appeal and commented that the decision "intimates no view on the party-respondent question." *Id.* at ___ n. 2, 115 S.Ct. at 1284 n. 2. Thus, *White* remains binding precedent in this Circuit and forecloses Ingalls's argument that the Director has no standing to respond in this case.

whether the ALJ's factual findings are supported by substantial evidence. *Tanner v. Ingalls Shipbuilding*, 2 F.3d 143, 144 (5th Cir.1993).

Section 33(g)(1) provides,

> "If the person entitled to compensation (or the person's representative) enters into a settlement with a third person [other than an employer or person in his employ] for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or by the person's representative.)" 33 U.S.C. § 933(g)(1).

Section 33(f) governs third-party recovery by persons entitled to compensation. If a person entitled to compensation enters into an unapproved third-party settlement for an amount less than he is entitled to under the Act, all rights to compensation under the Act are terminated pursuant to section 33(g)(1). On the other hand, if the person entitled to compensation enters a third-party settlement for an amount greater than his statutory entitlement, then the written approval requirement of section 33(g)(1) does not apply, and the employer would be entitled to a 100% set-off under section 33(f).

Mrs. Yates concedes that the pre-death settlements were not approved in writing by Ingalls but argues that when these settlements were made, Mr. Yates was the only "person entitled to compensation" and thus she was

not a "person entitled to compensation." She argues that because she had no right to compensation she was not required to obtain Ingalls's written approval for the pre-death settlements. On the other hand, Ingalls argues that Maggie Yates, as a potential widow, qualifies as "a person entitled to compensation" and that her failure to obtain written approval of the pre-death settlements in accordance with section 33(g) bars her claim for death benefits. Both the ALJ and the BRB agreed with Maggie Yates's interpretation of the phrase "a person entitled to compensation." The parties focus their arguments on *Estate of Cowart*, 505 U.S. 469, 112 S.Ct. 2589, a recent Supreme Court decision interpreting this phrase in section 33(g)(1).

In *Cowart*, the employee suffered a work-related hand injury, and his employer paid temporary total disability benefits for ten months but refused to pay permanent partial disability. During the period when he was not receiving any benefits, *Cowart* settled a third-party action without obtaining the written approval of his employer. *Cowart* argued that he was not "a person entitled to compensation" under section 33(g)(1) at the time of the settlement because his employer was not voluntarily paying benefits and a formal award of benefits had not been issued. Because he was not "a person entitled to compensation," *Cowart* contended that he was not required to obtain his employer's approval of the settlement pursuant to § 33(g)(1).

Rejecting *Cowart's* argument, the Supreme Court held that he became "a person entitled to compensation" at the time of the work-related injury and that it was immaterial whether the employee was receiving benefits at the time of the third-party settlement. *Id.* at 476-77, 112 S.Ct. at

2594-95. The Court stated, "Cowart suffered an injury which by the terms of the LHWCA gave him a right to compensation from his employer. *He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event yet to happen.*" *Id.* at 477, 112 S.Ct. at 2595 (emphasis added).

Both Maggie Yates and the Director argue that, under *Cowart*, Maggie Yates was not "a person entitled to compensation" at the time of the pre-death settlements because her right to recover death benefits did not vest until her husband's death. *See Travelers Ins. Co. v. Marshall*, 634 F.2d 843, 846 (5th Cir.1981) (stating that "a cause of action for death benefits certainly does not arise until death").

In response, Ingalls asserts that this panel should follow the Ninth Circuit's interpretation of "a person entitled to compensation" in a case very similar to the instant case. In *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2705, 129 L.Ed.2d 833 (1994), an employee exposed to asbestos during his employment filed a claim for disability benefits under the Act, and the employer disputed liability. The employee also filed a product liability suit against numerous asbestos manufacturers and entered into settlement agreements with several of those manufacturers without obtaining the written approval of his employer. Although his wife and daughter were not named as parties in the third-party suit, both settled their wrongful death claims against the manufacturers as part of the settlement agreements. In addition, his wife settled her loss of consortium claim in the same series of agreements.

After the employee died, an ALJ awarded disability benefits to his wife and death benefits to his wife and daughter. The Ninth Circuit held that the wife and daughter were "persons entitled to compensation" and therefore could not recover death benefits under the Act because they failed to obtain the written approval of the employer for the pre-death settlements as required by section 33(g). *Id.* at 848.

The *Cretan* court considered the Supreme Court's language in *Cowart* that the employee "became a person entitled to compensation at the moment his right to recovery vested," and concluded that it was dicta that was not binding on the court. The precise issue presented in *Cowart* was the definition of "a person entitled to compensation." The Court's determination that the employee qualified under this statutory test when his right to recovery vested is the core of the Supreme Court's holding. We therefore disagree with the *Cretan* court's conclusion that this critical part of the Supreme Court's opinion in *Cowart* is dicta.

Thus, applying *Cowart*'s definition we conclude that section 33(g)(1) does not bar Maggie Yates's death benefits claim because she was not "a person entitled to compensation" at the time of the pre-death settlements. At the time of the pre-death settlements, Maggie Yates's claim for death benefits had not vested. Three contingencies come to mind under which Maggie Yates's right to death benefits under the Act would have never accrued. She could have predeceased or divorced her husband, or Jefferson Yates could have died from causes unrelated to his employment. Under any of these scenarios, Maggie Yates's right to death benefits under the Act would never

have accrued. Because Mrs. Yates' right to death benefits had not vested when the pre-death settlements were made, her failure to obtain Ingalls's written approval of the pre-death settlements is irrelevant.

B.

Ingalls argues next that the BRB erred in concluding that Ingalls was not entitled to offset from death benefits due Ms. Yates the entire amount of the *post*-death settlements. The ALJ determined that Maggie Yates only received one-seventh of the net amount of the three post-death settlements. He held, however, that, as a matter of contract law, the settlement agreements Ms. Yates executed permitted Ingalls to offset the entire net amount of the post-death settlements. The BRB reversed and held that Ingalls was only entitled to set-off the net amount received by Maggie Yates.

We first consider the propriety of the BRB's offset under § 33(f) of the Act, without regard to the provisions of the settlement agreement. Section 33(f) provides:

> "If the person entitled to compensation institutes proceedings . . . the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the *net amount recovered against such third party*. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred *by such person* in respect to such proceedings (including reasonable attorneys' fees). 33 U.S.C. § 933(f) (emphasis added).

Ingalls first argues that, as a matter of law, it is entitled to a credit under section 33(f) for the net amount of all the post-death settlements. Ingalls argues that the appropriate set-off is the "amount recovered against the third party." Respondents counter that the proper offset is the net amount recovered by "such person" entitled to compensation. Several courts have addressed this precise issue. In *Force v. Director*, an employee's widow and her two children settled their potential wrongful death action with third-parties. 938 F.2d 981 (9th Cir.1991). In the widow's later claim for death benefits under the Act, the employer argued that it was entitled to a credit for the net amount the widow and her two children obtained in the settlement agreements. Like the Yates children, the Force children filed no claims for death benefits under the Act. Rejecting the employer's argument, the Ninth Circuit stated,

> "The offset provision [of section 33(f)] applies to the third party recovery obtained by "the person entitled to compensation" under the Act. *An employer is entitled to offset its liability to a particular claimant only the third party damages received by the claimant for the covered occupational injury or death* . . . The Force children did not file claims for LHWCA benefits and are not entitled to them; section 933(f) simply does not apply to the children or their third party recovery." *Id.* at 985 (emphasis added).[3]

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[3] The settlement at issue in *Force* was executed before the employee died. Because the court in *Force* also held that a potential widow was a "person entitled to compensation" under section 33(f), it applied section 33(f) to the pre-death settlement. Although Ingalls argues that we should adopt *Force's* definition

The Fourth Circuit has also adopted this interpretation of section 33(f) in determining apportionment among parties. *See I.T.O. Corp. of Baltimore v. Sellman*, 967 F.2d 971 (4th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1579, 123 L.Ed.2d 147 (1993) ("Employer's offset rights [under section 33(g)] are limited to the portion intended for the claimant since the claimant is the 'person entitled to compensation.' "). *See also Brown v. Forest Oil Corp.*, 29 F.3d 966, 972 (5th Cir.1994) (in the context of an employer's lien, "[e]mployer's offset rights are limited to the portion of the recovery intended for the employee").

Based on the plain language of § 33(f) and the above authorities, we conclude that Ingalls's argument that it is entitled as a matter of law to a credit for the net amount received by Mrs. Yates and her six children from the post-death settlements must be rejected. Ingalls is only entitled to a credit under section 33(f) for the net amount received by Mrs. Yates.

Relying on *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir.1987), Ingalls argues next that the provisions of the post-death settlement agreements provide them with an independent basis to obtain credit for the net amount of the settlements received by Maggie Yates and her six children. The respondents counter that the terms of the settlement agreement are ambiguous and cannot be reasonably interpreted as a consent by Maggie Yates to grant Ingalls a credit for the net amount of all third party recoveries. In addition, the respondents assert that the

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of "a person entitled to compensation" for section 33(g), it does not argue that it is entitled to a set-off under section 33(f) for the pre-death settlements.

BRB properly held that Ingalls had no right to enforce the terms of the settlement agreements.

Because we are persuaded that the respondents' first argument is meritorious, we do not reach their remaining contentions. For the reasons explained below, we conclude that the language in these contracts does not clearly and unambiguously require Mrs. Yates to give Ingalls a credit for any sums that exceed the net amount she received from the settlements.

Three separate settlements were reached in this case and three separate releases were executed. The settlement with Raymark Industries et al. was signed on June 9, 1987. Mrs. Yates and her six children are named in the body of the release and referred to collectively as "Releasors." The critical paragraph provides in part that if any claim for worker's compensation benefits . . . [1] "shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to any Releasor shall first be given credit for the consideration paid to Releasors under this agreement, less reasonable costs of collection, and [2] shall make no payment of any compensation benefits to any Releasor until the consideration paid to Releasors under this agreement is exhausted." The initial clause quoted above reflects an intent to give the employer a credit to the extent any compensation payments to the Releasors constitute "a lien against the consideration paid herein." Obviously the only portion of the third party settlement which could be subject to a lien are for sums paid to a person "entitled to compensation." No compensation lien

can be imposed on settlement sums paid by a third party to an employee not entitled to compensation. *See* 33 U.S.C. § 917. Thus, the language in the release which purports to give the employer a set-off against settlement sums subject to a compensation lien reflects an intent to limit the set-off to the portion of the settlement paid to a party entitled to compensation.

This supports the director and Mrs. Yates' argument that the language of the instrument does not reflect an intent to grant a set-off for the total amount of the settlement. The second clause in the above quoted provision ("and shall make no payment of any compensation benefits to any Releasor until the consideration paid to Releasors under this agreement is exhausted") could, if read in isolation, reflect an intent to grant the employer a credit for the total consideration paid to all Releasors under the settlement agreement. But the second clause does not clearly indicate an intent to grant a credit for sums not covered by a compensation lien. The second clause can reasonably be read to grant a credit to the employer against sums paid to all "Releasors" for all settlement sums subject to a compensation lien.[4] The

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[4] In the *Raymark* settlement, the third party tort defendants obtained an individual "acknowledgement" from Maggie Yates giving Litton systems "credit for the amount of money paid to *me* by the above named defendant." It stated further that "Litton Systems will owe *me* no workmen's compensation benefits or medical benefits under the Longshore & Harbor Workers' Compensation Act until the amount received *by me* from the above mentioned defendant has been exhausted based on the weekly benefits due me from Litton Systems, Inc. . . . " This instrument, prepared for Mrs. Yates' signature, makes no reference to Mrs. Yates' children; and Mrs. Yates' children signed no separate

settlement instrument does not evidence an intent to grant Ingalls a set-off in derogation of § 33(f) of the Act with sufficient clarity to permit enforcement.

Language almost identical to that quoted above in the Raymark release is included in the other two instruments. In the Wellington settlement, the release provides that if any claim for workmen's compensation shall be filed and be successful . . . "and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to either of the undersigned shall first be given credit for the consideration paid to the undersigned under this agreement. . . . " The Manville settlement contains an almost identical provision.[5]

For the reasons stated above, we conclude that the language in these three instruments do not reflect with sufficient clarity an intent to grant Ingalls a credit against any larger portion of the settlement sum than would be subject to a compensation lien. A compensation lien would only be imposed on the settlement sums received by Mrs. Yates since she was the only settling party who was entitled to compensation.[6]

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acknowledgement similar to the one signed by Mrs. Yates. (emphasis added) See page 17 of RX 21.

[5] Neither the Wellington nor the Manville settlement papers include a separate document similar to the "Acknowledgement" signed by Mrs. Yates in the Raymark settlement and discussed in note 4.

[6] Although Mrs. Yates was not entitled to compensation at the time of the pre-death settlements, her right to compensation under the Act accrued upon Mr. Yates' death. *See* 33 U.S.C. § 909.

For the reasons stated above, we affirm the order of the BRB.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40716

INGALLS SHIPBUILDING, INC., and
AMERICAN MUTUAL LIABILITY INSURANCE
COMPANY, in liquidation, by and
through THE MISSISSIPPI INSURANCE
GUARANTY ASSOCIATION,

Petitioners,

versus

DIRECTOR, OFFICE OF WORKERS'S COMPENSATION
PROGRAMS, U.S. DEPARTMENT OF LABOR and
MAGGIE YATES (widow of Jefferson Yates),

Respondents.

On Petition for Review of An Order of the
Benefits Review Board

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 10/20/95, 5 Cir., ___, ___ F.3d ___)

(November 22, 1995)

Before WISDOM, GARWOOD and DAVIS, Circuit Judges.

PER CURIAM:

(✓) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel

Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
W. EUGENE DAVIS
United States Circuit Judge

BRB Nos. 92-2322
and 92-2322A

MAGGIE YATES
(Widow of JEFFERSON YATES)

Claimant-Petitioner
Cross-Respondent

v.

INGALLS SHIPBUILDING, INCORPORATED

Self-Insured
Employer-Respondent
Cross-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondent

DATE ISSUED:
JUN 29 1994

DECISION and
ORDER

SYLLABUS

Digest
Section

3706 The Board found that a potential widow is not a "person entitled to compensation" under Section 33(g)(1) prior to the death of her spouse, and thus the subsection does not act as a bar to the widow's subsequent death benefits claim where the widow and decedent settled third-party claims without written approval prior to his death.

3704 Where the settlement amounts were apportioned among claimant and her six non-dependent adult children consistent with Mississippi law, the Board found that the ALJ erred in finding employer to be entitled to an offset for the total net proceeds of claimant's post-death settlements. Therefore, the Board vacated the ALJ's finding that employer is entitled to a credit of the total proceeds of the post-death settlements, and held that employer is entitled to offset only the amount claimant received in the post-death settlements, not the amounts received by decedents' other heirs. Accordingly, the Board modified the ALJ's decision to reflect that employer is entitled to offset only claimant's one-seventh share of the post-death settlements against its compensation liability.

Appeals of the Decision and Order – Awarding Benefits of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Steven J. Miller (Ransom P. Jones, III, P.A.), Pascagoula, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Mark A. Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C. for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant, the widow of Jefferson Yates (decedent), appeals, and employer cross-appeals, the Decision and Order – Awarding Benefits (91-LHC-324) of Administrative Law Judge Quentin P. McColgin rendered on a claim filed pursuant to the provisions of the Longshore and

Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The Board held oral argument in this case in Mobile, Alabama, on January 11, 1994.

Decedent worked for employer as a shipfitter for various periods between 1953 and 1967, during which time he was exposed to asbestos. Decedent voluntarily retired from his subsequent non-maritime employment in 1974. In March 1981, decedent was diagnosed as suffering from asbestosis, chronic bronchitis, and possible malignancy of the lungs. On April 16, 1981, decedent filed a claim for benefits under the Act. On May 26, 1981, he filed a third-party lawsuit in federal court against 23 manufacturers of asbestos products.

Prior to the adjudication of his longshore claim, decedent entered into settlement agreements with several of the third-party defendants. While claimant was not a named party plaintiff in the third-party action undertaken by decedent, she did sign each of these pre-death settlements as a co-releasor with regard to her loss of consortium. On June 8, 1982, employer admitted the compensability of decedent's claim under the Act and tendered benefits. Subsequently, on May 5, 1983, a Section 8(i), 33 U.S.C. §908(i) (1982), settlement was executed by the parties, awarding decedent a lump sum of $15,000, open medical benefits and attorney's fees. Payment was made pursuant to an order of the deputy commissioner dated May 10, 1983. Following this order, decedent

entered into additional third-party settlements which were also co-signed by claimant; in at least two of these settlements, claimant signed as a co-releasor with regard to potential wrongful death actions, in addition to her loss of consortium. With regard to these third-party settlements entered into by decedent and claimant prior to his death (the pre-death settlements), written approval by employer was not obtained.

Decedent died on January 28, 1986, due to prostate cancer.[1] On April 22, 1986, claimant filed a claim for death benefits under the Act; employer filed its notice of controversion on May 21, 1986. Claimant and decedent's six non-dependent, adult children continued decedent's federal court action, which converted from a personal injury action to a wrongful death action. Thereafter, claimant and decedent's children entered into settlements with the following three third-party defendants (the post-death settlements):

Defendant	Date	Gross	Net
Raymark	May 10, 1988	$2,821	$1,880.67
Wellington	April 5, 1989	$60,000	$36,000
Johns-Manville	June 19, 1989	$43,000	$25,800

Unlike the pre-death settlements, written approval from employer of the post-death settlements was obtained.

After concluding that it could credit against its potential compensation liability all the net proceeds from these settlements, and in light of claimant's age, 83,

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[1] The parties stipulated that decedent's asbestosis contributed to his death. *See* Jt. Ex. 1.

employer thereafter filed a motion to amend its "answer," admitting compensability of claimant's death benefits claim, but seeking a dismissal of the claim on the basis that it was a mathematical impossibility that it would ever have to pay claimant benefits. In response, claimant asserted that only her share, one-seventh of the net proceeds from the settlements, should be credited against employer's compensation liability under the Act.

In his Decision and Order Awarding Benefits, the administrative law judge, noting that claimant's claim for death benefits is separate and distinct from decedent's claim for disability benefits, found that at the time of the pre-death settlements, claimant was not "a person entitled to compensation" under Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1), and was thereby exempt from that subsection's requirement that written approval of the third-party settlements be obtained from employer. Accordingly, the administrative law judge found that claimant's claim for death benefits under the Act was not barred pursuant to Section 33(g)(1). Furthermore, the administrative law judge found that claimant provided employer with notice of the pre-death settlements, as required by Section 33(g)(2) of the Act, 33 U.S.C. §933(g)(2). Next, the administrative law judge found that by operation of the Mississippi wrongful death statute, as well as claimant's own testimony, the proceeds of the post-death settlements were apportioned among claimant and decedent's six non-dependent children, such that claimant received only one-seventh of the net amount of those three settlements. However, the administrative law judge found that based on the terms of these post-death

settlement agreements, employer was contractually entitled to receive a credit under Section 33(f) of the Act, 33 U.S.C. §933(f), for the entire amount of the net proceeds of these settlements, not only the one-seventh claimant received, to offset employer's liability for claimant's death benefits.[2] Accordingly, the administrative law judge awarded claimant death benefits, commencing January 28, 1986, pursuant to Section 9 of the Act, 33 U.S.C. §909, and found employer to be entitled to a credit, pursuant to Section 33(f), for the net amount of the post-death settlements entered into by claimant.

On appeal, claimant contends that the administrative law judge erred in finding that employer was entitled to offset its liability for claimant's death benefits by the entire net proceeds of the third-party settlements into which she entered subsequent to decedent's death. Specifically, claimant asserts that the administrative law judge misinterpreted the language of the three post-death settlements, since claimant could not contractually obligate herself to give employer a credit for those shares of the net proceeds which, under Mississippi law, were not her property but the property of her children. Employer

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[2] The administrative law judge also found that claimant's attorney's fee for the third-party settlements, which was based on a 40 percent contingency fee contract, is reasonable. As such, the administrative law judge found that the fee shall be deducted as an expense in determining the net amount of claimant's third-party recovery under Section 33(f) of the Act. In an Order dated June 23, 1992, the administrative law judge denied employer's motion for reconsideration regarding this issue. The administrative law judge's findings in this regard are not challenged on appeal.

responds, urging affirmance. In a reply brief, claimant asserts that it was not the intent of decedent's non-dependent heirs to give employer a credit for the settlement shares they received, and that since those heirs never filed claims under the Act for benefits, they are not subject to the Act's jurisdiction.

In its cross-appeal, employer first contends that, pursuant to the holding of the United States Supreme Court in *Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), claimant is "a person entitled to compensation" under Section 33(g)(1), and therefore was required to obtain employer's written approval of the pre-death settlements. Thus, employer avers that since claimant joined in decedent's third-party settlements, which employer did not approve, the administrative law judge erred in not finding that her subsequent claim for death benefits was barred pursuant to Section 33(g)(1).[3] In addition to its appeal of the administrative law judge's finding with regard to Section 33(g)(1), employer, as a protective measure, contends that the administrative law judge should have awarded employer an offset for the net amount received by all third-party plaintiffs pursuant to Section 33(f), notwithstanding the language contained in the settlements themselves. Specifically, employer argues, *inter alia*, that under Section 33(f), the amount employer is entitled to offset

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[3] Before he settled his claim under the Act, decedent entered into settlements on May 13, 1981, March 29, 1982, and May 20, 1982. After the settlement order of May 10, 1983, decedent settled third-party claims on May 21, 1983, January 11, 1984, January 30, 1984, and January 31, 1984.

against its liability is the net amount "recovered against such third person," not the amount necessarily recovered by claimant individually. Claimant responds, again urging affirmance of the administrative law judge's finding that her claim for death benefits is not barred by Section 33(g)(1) and reversal of his finding that employer was entitled to offset the total net proceeds of the post-death settlements against its liability under the Act. In reply, employer lastly contends that the holding of the United States Court of Appeals for the Ninth Circuit in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir.1993), *aff'g in part and rev'g in part* 24 BRBS 35 (1990), is dispositive of both the Section 33(g)(1) and 33(f) issues in the instant case.

The Director, Office of Workers' Compensation Programs (the Director), has responded to the appeals in this case, supporting claimant's contentions with regard to both Section 33(g)(1) and Section 33(f). Specifically, the Director contends that the United States Court of Appeals for the Ninth Circuit in *Cretan* misinterpreted the Supreme Court's decision in *Cowart* holding that a person becomes "entitled to compensation" at the moment his right to recovery vests. Since claimant's right to recovery did not vest until her husband died, the Director argues, she was not a "person entitled to compensation" at the time of the pre-death settlements, and thus, Section 33(g) does not bar her claim for death benefits. Moreover, the Director asserts that under Section 33(f), apportionment of a third-party recovery is *mandatory* since that subsection allows the employer to offset only that portion of a settlement attributable to the "person[s] entitled to compensation." The Director asserts that claimant's children

were not "persons entitled to compensation" since they did not file claims under the Act. The Director also agrees with claimant that the administrative law judge misinterpreted the language of the post-death settlements; in the alternative, the Director argues that even if the administrative law judge was correct in finding that employer was contractually entitled to receive a credit for the post-death settlement proceeds attributable to claimant's children, Section 15(b) of the Act, 33 U.S.C. §915(b), prohibits such a result.

I. Section 33(g)(1)

The first issue presented by the appeals in this case is whether the administrative law judge properly determined that claimant's claim for death benefits under the Act was not barred by Section 33(g)(1) of the Act. We hold that the administrative law judge correctly concluded that Section 33(g)(1) did not bar claimant from pursuing her claim for death benefits.

Section 33(g)(1), as amended in 1984, states:

> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. §933(g)(1) (1988). Claimant concedes that the settlements entered into prior to decedent's death were not approved in writing by employer.[4] The administrative law judge found that claimant, as a potential widow, was not a "person entitled to compensation" at the time that the pre-death settlements were executed.[5] Moreover, the administrative law judge found that claimant's death benefits claim is separate and distinct from decedent's claim for benefits, and that her right to file a claim for death benefits did not arise until decedent's death. Thus, the administrative law judge found that claimant was under no obligation to obtain employer's written approval of the pre-death settlements, even though she acted as a co-releasor in signing them, and that Section 33(g)(1) does not act as a bar to her claim for death benefits.

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[4] As noted previously, employer approved the three post-death settlements. *See* Emp. Ex. 22.

[5] At the time the administrative law judge's Decision and Order was issued, the Supreme Court had not yet affirmed the Fifth Circuit's decision in *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir.1991) (*en banc*). The administrative law judge found that the Fifth Circuit's interpretation of Section 33(g)(1) was inapplicable to the instant case since it did not concern the issue of potential widows.

Our consideration of employer's contentions on appeal must begin with a discussion of *Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), wherein the United States Supreme Court held that under the plain language of Section 33(g)(1), an injured employee forfeits his right to compensation benefits under the Act by failing to obtain the employer's written approval of a third-party settlement for an amount less than the compensation due under the Act. In *Cowart*, the claimant suffered a work-related injury and the employer paid temporary total disability benefits for ten months but refused to pay permanent partial disability benefits. During the period when he was not receiving benefits, the claimant settled a third-party action, but did not secure the employer's written approval of the settlement. The claimant argued that since the employer was not voluntarily paying benefits at the time of the settlement and a formal award of benefits had not been issued, he was not a "person entitled to compensation" under Section 33(g)(1). Thus, the claimant argued, compliance with Section 33(g)(1) was not required.

The Board agreed with the claimant's argument. *See Cowart v. Nicklos Drilling Co.*, 23 BRBS 42 (1989). However, the United States Court of Appeals for the Fifth Circuit reversed, holding that Section 33(g) contains no exceptions to the written approval requirement. *See Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir.1991) (*en banc*). In affirming the Fifth Circuit's decision, the Supreme Court held that the claimant "became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability." *Cowart*, ___ U.S. ___, 112 S.Ct. at 2595, 26 BRBS at

51-52 (CRT). Thus, the claimant became a person entitled to compensation at the time he suffered his work-related injury. Despite the employer's conceded knowledge of the settlement,[6] the Court held that the claimant was required to obtain the employer's written approval of the settlement pursuant to Section 33(g)(1).[7]

As claimant and the Director assert in their respective briefs, the Supreme Court in *Cowart* did not consider the issue at bar, *i.e.*, whether a potential widow is a "person entitled to compensation" under Section 33(g)(1) prior to the death of her spouse, and thus whether that subsection would act as a bar to the widow's subsequent death benefits claim where the widow and decedent settled third-party claims without written approval prior to his death. Applying *Cowart* to the present claim, it is clear that decedent's pre-death settlements and his obligation to obtain employer's consent to those settlements are relevant to decedent's claim for disability benefits accruing prior to his death and not to his widow's claim for death benefits. As Judge Brown so cogently details in

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[6] Because the issue had not been briefed, the Court did not discuss the effect of employer's participation in the settlement. *Cowart*, ___ U.S. ___, 112 S.Ct. at 2598, 26 BRBS at 53 (CRT).

[7] The Court noted that a claimant is required to provide notice of a settlement under Section 33(g)(2), but not written approval, in two instances: "(1) Where the employee obtains a judgment, rather than a settlement, against a third party; and (2) Where the employee settles for an amount greater than or equal to the employer's total liability." *Cowart*, ___ U.S. ___, 112 S.Ct. at 2597, 26 BRBS at 53 (CRT).

his concurring opinion, the facts of this case clearly demonstrate the relationship of the pre-death third-party settlements to the pre-death disability claim and the post-death settlements to the death benefits claim. Decedent entered into a Section 8(i) settlement of his disability claim in May 1983 for a lump sum of $15,000, medical benefits, which ultimately amounted to $454.50, and an attorney's fee. Employer's total liability for compensation and medical benefits was $15,454.50, which was employer's lien in the third-party suit. The pre-death settlements netted a greater amount, sufficient to satisfy employer's lien in full. I fully agree with my colleague that since the amount of the pre-death settlements exceeded the compensation due decedent, written approval of those settlements was not required under Section 33(g)(1). Moreover, failure to obtain approval of those settlements cannot bar the subsequent claim for death benefits by decedent's widow, claimant herein. At the time of the pre-death settlements claimant had no vested right to death benefits.

In his decision, the administrative law judge found that under Section 9 of the Act, 33 U.S.C. §909, and Section 702.241 of the regulations, 20 C.F.R. §702.241, claimant's claim for death benefits is separate and distinct from decedent's claim for disability and medical benefits. *See* Decision and Order at 8-10. Thus, the administrative law judge determined that "the Act embodies the concept that [claimant's] action for death benefits would not be recognizable until [decedent's] death occurred." *Id.* at 9. Accordingly, after further finding that Congress did not confer a cause of action for Section 9 death benefits prior to the death of the injured employee,

the administrative law judge determined that claimant, for purposes of Section 33(g)(1), could not have been deemed a "person entitled to compensation" until decedent's death occurred. In response to employer's contentions of error, claimant similarly asserts that her right to file a claim for death benefits did not vest until decedent's death from his work-related injury and, therefore, it is impossible for her to be deemed a "person entitled to compensation" *before* her husband's death.[8]

Both the United States Court of Appeals for the Fifth Circuit, wherein appellate jurisdiction of this case lies, and the Board have previously recognized the distinction between disability and death benefits claims. *See Travelers Insurance Co. v. Marshall,* 634 F.2d 843, 12 BRBS 922 (5th Cir.1981); *Close v. International Terminal Operations,* 26 BRBS 21 (1992). In *Marshall,* the Fifth Circuit noted that a cause of action for death benefits does not arise until death. Similarly, in *Close,* a case which involved the question of whether Section 9 under the 1972 Amendments or 1984 Amendments applied, the Board held that the right to death benefits is separate and distinct from the right to

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[8] Claimant also argues that *Cowart* is inapplicable to the instant case because the Supreme Court there interpreted Section 33(g)(1) as amended in 1984. This contention is without merit. In *Cowart,* the Supreme Court noted that while Congress redesignated then subsection 33(g) to what is now (g)(1) by virtue of the 1984 Amendments, the phrase "person entitled to compensation" was not changed. *Cowart,* ___ U.S. ___, 112 S.Ct. at 2589, 26 BRBS at 50 (CRT). It is also noted that claimant has never asserted, at the administrative law judge level or before the Board, that the 1984 Amendments to Section 33(g) are not applicable because the pre-death settlements were executed prior to the effective date of the 1984 Amendments.

disability benefits, and does not arise until the death of the employee occurs. This interpretation is supported by the Act,[9] which sets forth two separate and distinct classes of claimants who may have a right to benefits, *i.e.*, injured employees who seek disability benefits and the spouses of injured employees who, as a result of the employees' work-related deaths, seek death benefits, *see* 33 U.S.C. §§908, 909, as well as Section 702.241(g) of the implementing regulations, which states that an agreement among the parties to settle a claim "shall not be a settlement of survivor benefits nor shall the settlement affect, in any way, the right of survivors to file a claim for survivor's benefits." 20 C.F.R. §702.241(g).

Moreover, this distinction between disability and death claims is supported by the decision of the Supreme Court in *Cowart*. Specifically, in determining when the claimant in that case became "a person entitled to compensation," the Court stated that "the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the person satisfies the prerequisites attached to the right." *Cowart*, ___ U.S. ___, 112 S.Ct at 2595, 26 BRBS at 51 (CRT). The Court held that the claimant Cowart became "a person entitled to compensation" at the

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[9] In setting forth the enactment dates for the 1984 Amendments to the Act, Congress specifically stated that the amended Section 9 was to apply to any death occurring after September 28, 1984. *See* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub.Law 98-426, §28(d), 98 Stat. 1639, 1655; *see generally Mikell v. Savannah Shipyard Co.*, 24 BRBS 100, 103 n. 1 (1990), *aff'd on recon.*, 26 BRBS 32 (1992).

moment his right to recovery vested. *Id.*, ___ U.S. ___, 112 S.Ct. at 2595, 26 BRBS at 51-52 (CRT). In the instant case, claimant's right to death benefits under the Act could not have vested *before* she became a widow. As the Director notes, numerous events may occur which could affect a spouse's future claim for death benefits before that spouse's right to death benefits vests; for example, the employee may die of a non-work related ailment, the employee's spouse may predecease the employee, a divorce may occur, or the law may change. The occurrence of any of these events would preclude a vesting of a right to death benefits under the Act. In *Marshall*, 634 F.2d at 843, 12 BRBS at 922, the Fifth Circuit noted the interrelationship between one of these pre-death factors, specifically the employee's injury and the employee's subsequent death, stating that death is not the only operative fact relevant to a determination of the availability of death benefits under the Act. Rather, while a cause of action for death benefits does not arise until death, the existence of a maritime-related injury must still be established.[10] Thus, as numerous unforeseen events can terminate a potential entitlement to compensation if they occur prior to the employee's death, the right to recover death benefits cannot arise, or vest, until, at a minimum, an employee's death occurs leaving behind a surviving spouse. Accordingly, we reject employer's contention that the spouse of an injured employee is "entitled" to death

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[10] Similarly, the United States Court of Appeals for the First Circuit in *Puig v. Standard Dredging Corp.*, 599 F.2d 467, 10 BRBS 531 (1st Cir.1979), acknowledged that the right to death benefits under the Act arises at death.

benefits prior to the actual work-related death of the employee.

We note that the United States Court of Appeals for the Ninth Circuit in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir.1993), *aff'g in part and rev'g in part* 24 BRBS 35 (1990), declined to extend the Supreme Court's statement that a person does not become "entitled to compensation" until the right to recovery vests, to the situation where a spouse and daughter of an employee settled their third-party tort actions prior to the death of the employee. Rather, the court in *Cretan* held that an injured employee's spouse and daughter were persons "entitled to compensation" at the time pre-death settlements were entered into and were therefore subject to the provisions of Sections 33(f) and (g). We, however, decline to accept this interpretation of Section 33(g)(1), as it is contrary to the Supreme Court's language in *Cowart*.[11] In our opinion, the decision of the Supreme Court in *Cowart*, as well as the Fifth Circuit's holding in *Marshall*, clearly supports a determination that a spouse's right to death benefits does not vest until he or she becomes a widower or widow upon the death of the injured employee. We therefore hold that at the time of the pre-death settlements in this case, claimant was not a "a

[11] In fact, the Ninth Circuit, after noting that the language used by the Supreme Court regarding vesting did not refer to the facts in the case before the court, characterized the Court's statement as dicta and stated "[we] decline to give the Supreme Court's statement a binding effect that there is no reason to believe the Court intended." *Cretan*, 1 F.3d at 847, 27 BRBS at 98 (CRT).

person entitled to compensation," and thus was not subject to the requirements of Section 33(g)(1). Accordingly, we affirm the administrative law judge's finding that claimant's death benefits claim was not barred by Section 33(g)(1) of the Act.

II. Section 33(f)

We now address claimant's contention on appeal that the administrative law judge erred in finding that employer was entitled to credit the entire net proceeds of the post-death settlements entered into by claimant and decedent's six children against its compensation liability to claimant. In his Decision and Order, the administrative law judge rejected employer's argument that under Section 33(f),[12] claimant is not entitled to an apportionment of the post-death settlement proceeds. Instead, the administrative law judge found that under Mississippi's wrongful death statute, "[d]amages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children, all shall go

[12] Amended Section 33(f) provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C. §933(f) (1988).

to his wife." MISS. CODE ANN. §11-7-13 (1972).[13] *See* Decision and Order at 18. Thus, the administrative law judge rejected employer's argument that claimant was attempting to obtain a double recovery since, under operation of the Mississippi statute, claimant was entitled to only one-seventh of the post-death settlement proceeds, and the evidence showed that claimant in fact received only one-seventh of the proceeds of those settlements. Tr. 27-28. The administrative law judge determined that under operation of state law, the settlement proceeds were apportioned among the parties, and that claimant never made any claims concerning apportionment according to the types of damages she received.

The administrative law judge went on to find, however, that as a matter of contract, employer was entitled to offset the total net amounts of the third-party post-death settlements, since language to this effect was contained in each of the three post-death settlements entered into by claimant and decedent's six non-dependent children, and approved by employer. The administrative law judge cited the pertinent language in the settlements entered into with Raymark, Wellington and Johns-Manville respectively. With regard to Raymark, the agreement states:

> Releasors do hereby represent and warrant to Releasees that whether there is now pending any claim for worker's compensation benefits

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[13] Since the federal third-party law suit was filed in Mississippi, the administrative law judge noted that the federal district court was required to apply Mississippi state law. *See* Decision and Order at 18.

> under any state or federal law or statute, including but not being limited to the Mississippi Workers' Compensation Act or the Federal Longshoremen's and Harbor Workers' Act, or if any such claim shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to *any Releasor* shall first be *given credit for the consideration paid to Releasors* under this agreement, less reasonable cost collection, and shall make no payment of any compensation benefits to *any Releasor* until the *consideration paid to Releasors under this agreement is exhausted*. . . .

Emp. Ex. 21 at 4-5 (emphasis added).

The Wellington "Final Judgment Approving Settlement and Dismissing with Prejudice" states:

> The Court finds that the above offer of settlement is reasonable and in the best interest of said parties, and it is therefore, approved, provided that if any claim be pending or hereafter filed by the plaintiff, the decedent's heirs, or anyone in privity with them for benefits under the Mississippi Workers' Compensation Act, the Federal Longshoremen's and Harbor Workers' Compensation Act, or any other law which provides benefits to be paid by the decedent's employer, and/or insurance carrier, and any such employer and/or insurance carrier be ordered to pay such benefits resulting from or in any way related to any matter, fact, or thing appearing in the Complaint filed in this cause,

> then under the provisions of the applicable compensation act such employer and/or its insurance carrier shall first be given *credit for the net amount* of the aforesaid sum *accruing to the plaintiff and the decedent's heirs.*

Emp. Ex. 21 at 20-21 (emphasis added). The administrative law judge noted that the Wellington settlement itself uses the same language as cited above in the Raymark settlement. Emp. Ex. at 31-32. He also acknowledged that the settlement with Johns-Manville uses different language, to wit:

> The undersigned further agree to be responsible for the required reimbursement of all outstanding medical bills and/or worker compensation benefits paid to or on behalf of the undersigned to date, and shall indemnify and hold harmless the TRUST up to the amount of this settlement for any such sums adjudicated to be a lien upon this settlement.

Emp. Ex. 21 at 46. The administrative law judge noted, however, that the agreement also contains language similar to that used in the Raymark settlement, which gives employer credit for the entire amount of the net proceeds.[14] Emp. Ex. 21 at 47-48. Thus, the administrative

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[14] This clause of the settlement states:

> The undersigned do hereby represent and warrant to the TRUST that whether there is now pending any claim for worker's compensation benefits under any state or federal law or statute, including, but not being limited to, the Mississippi Workers' Compensation Act or the Federal Longshoremen's and Harbor Workers' Act, or if any such claim shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to *either of the undersigned shall first be given credit for the consideration paid to the undersigned* under this agreement, less reasonable cost of collection, and shall make no payment of any compensation benefits to the undersigned until the consideration paid to the undersigned under this agreement is exhausted.

Emp. Ex. 21 at 47-48 (emphasis added).

law judge concluded that with respect to the three post-death settlements, claimant is contractually obligated to give employer credit for the entire amount of the net proceeds, not only the one-seventh share she received.[15]

On appeal, claimant and the Director argue that the administrative law judge misinterpreted the language of the post-death settlements and contend that the settlements cannot give employer an offset for the amounts which decedent's heirs received. Claimant and the Director further argue that since decedent's heirs did not file their own claims under the Act, they are not "persons entitled to compensation" under Section 33(f) and, thus, that subsection cannot be used to entitle employer to offset the amounts which they received as a result of the post-death settlements. In its cross-appeal, employer challenges the administrative law judge's holding that Section 33(f) allows it a credit for only the net proceeds received by the claimant under the Act, contending that it

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[15] The administrative law judge noted that this contractual obligation was recognized by the United States Court of Appeals for the Fifth Circuit in *St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987).

should be entitled to offset the entire net amount of the proceeds recovered against the third-parties.

We agree with claimant and the Director that the administrative law judge erred in finding employer to be entitled to an offset for the total net proceeds of claimant's post-death settlements. Initially, the administrative law judge properly found that under Section 33(f), the settlement was clearly apportioned among the parties in the third-party action. Section 33(f) states that if "the person entitled to compensation" files a third-party lawsuit, employer is required to pay the excess of the amount which the Secretary determines is payable under the Act, "over the net amount recovered against such a third person." 33 U.S.C. §933(f). In the instant case, the settlement amounts were apportioned among claimant and her six non-dependent adult children consistent with Mississippi law. Only claimant filed a claim under the Act and was entitled to benefits. Therefore, only she can be deemed "a person entitled to compensation" under Section 33(f). *See Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir.1991), *aff'g in part and rev'g in part Force v. Kaiser Aluminum and Chemical Corp.*, 23 BRBS 1 (1989).[16]

Employer urges, nonetheless, that we affirm the administrative law judge's determination that it was entitled to offset the full net amount of the settlements, as this decision was made not as a matter of law under

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[16] We therefore reject employer's argument that the administrative law judge should have found it entitled to a full credit of the net proceeds of the post- death settlements as a matter of law.

Section 33(f), but as a matter of contract. We reject this argument, as the administrative law judge's decision is contrary to law. Initially, we disagree with employer's contention that the decision of the United States Court of Appeals for the Fifth Circuit in *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987), mandates affirmance of the administrative law judge's findings on this issue. In *Wilfred*, the Fifth Circuit held that the employee's widow, in signing a third-party settlement agreement, obligated herself to give employer a credit for all sums which she received as a result of that agreement. Unlike the employer in *Wilfred*, who actually was a party to and signed the third-party settlement agreement, employer herein was not a party to the third-party settlements, but merely approved those settlements. Thus, employer did not enter into a contract with the third party regarding the settlement proceeds. I completely agree with my concurring colleague's analysis of the contractual rights of claimant and employer and their effect on Section 33(f). Employer was neither a party to the contracts nor can it be considered a third-party beneficiary. Moreover, as Judge Brown points out, language in the contract with Raymark indicates employer is to receive credit for sums received by claimant. The court in Wilfred recognized claimant's obligation to give employer credit only for those sums which she herself had received, which is the result we hold is proper in the case at bar. Claimant here received only one-seventh of the settlement proceeds, and only the amounts received are subject to the offset.

Finally, we agree with the Director that, assuming, *arguendo,* the administrative law judge correctly interpreted the language of the post-death settlements as entitling employer to a credit of the entire net proceeds of the settlements, enforcement of such language would be tantamount to a waiver of claimant's compensation which is precluded by Section 15(b) of the Act, 33 U.S.C. §915(b).[17] While our dissenting colleague maintains that Section 15 cannot be applied to the instant case since that section invalidates only agreements between employees and employers, we believe that to allow the surviving spouse of an employee seeking benefits under the Act to step into the shoes of the employee is a fair application of Section 15, and is consistent with the Supreme Court's requirement that the Act be liberally construed in order to effectuate its remedial purposes. *See Potomac Electric Power Co. v. Director, OWCP,* 449 U.S. 268, 281, 14 BRBS 363, 368 (1980). We therefore vacate the administrative law judge's finding that employer is entitled to a credit of the total proceeds of the post-death settlements, and hold that employer is entitled to offset only the amount claimant received in the post-death settlements, not the amounts received by decedent's other heirs.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is modified to reflect that employer is entitled to offset only claimant's one-seventh

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[17] Section 15(b) of the Act provides:

> No agreement by an employee to waive his right to compensation under this chapter shall be valid.

33 U.S.C. §915(b).

share of the post-death settlements against its compensation liability. In all other respects, the Decision and Order – Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

BROWN, Administrative Appeals Judge, concurring:

Factually this is an unusual case and, in many respects, it is a case of first impression. Decedent, Jefferson Yates, worked as a shipfitter for Ingalls Shipbuilding, Incorporated for periods during 1953 and 1967 during which time he was exposed to asbestos particles. In March 1981, he was diagnosed as suffering from asbestosis and several other conditions. On April 16, 1981, he filed a claim against employer for benefits under the Longshore and Harbor Workers' Compensation Act. On May 26, 1981, he also filed a third-party lawsuit in the United States District Court for the Southern District of Mississippi against 23 manufacturers of asbestos products.

I. Section 33(g)(1)

Between April 1982 and March 1984 Mr. Yates entered into settlements with Armstrong, Garlock, Rockwool, and H.K. Porter, Inc., four of the defendants in the third-party suit. On May 5, 1983, he entered into a Section 8(i), 33 U.S.C. §908(i) (1982), settlement of his Longshore claim with employer for a lump sum of $15,000, medical benefits and attorney's fees. The settlement was approved

by the deputy commissioner on May 10, 1983. Subsequently, decedent entered into additional third-party settlements with GAF Corp., Owens-Corning Fiberglass and Owens-Illinois Inc. Decedent's wife, Maggie Yates, was not a party in the third-party suit but did sign the settlement agreements as a co-releasor. As to the seven settlements entered into during decedent's lifetime, written approval by employer was not obtained.

Decedent died on January 28, 1986. On April 22, 1986, his widow, claimant, filed a claim for death benefits under the Act against employer. Furthermore, claimant and decedent's six non-dependent adult children continued the third-party suit against the remaining asbestos defendants, which was then treated as a wrongful death action. Subsequently, claimant and the six children entered into settlements with Raymark on May 10, 1988, for $2,821, Wellington on April 4, 1989, for $60,000 and Johns-Manville on June 19, 1989, for $43,000. Written approval of these three settlements was obtained from employer and LS-33 forms were filed. Emp. Ex. 22.

The first issue presented by the appeals is whether claimant's claim for death benefits is barred by Section 33(g)(1) of the Act which, as amended in 1984, holds, in effect, that when a person entitled to compensation enters into a settlement with a third person for an amount less than the compensation to which the person would be entitled under the Act, the employer shall be liable for compensation in excess of the net third-party recovery only if the employer and its carrier gave written approval prior to execution of the settlement. It is conceded that written approval was not obtained in connection with the seven settlements executed prior to decedent's death.

Employer takes the position that claimant's death claim under the Act is barred because she participated in the pre-death settlements as a co-releasor and written approval was not obtained. The administrative law judge held that Section 33(g)(1) did not bar claimant because at the time of the pre-death settlements she was not a "person entitled to compensation" in that any claim for death she might have did not vest until decedent's death. The Director also takes this position.

Any discussion of the meaning of the phrase "person entitled to compensation" must begin with *Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992). The Supreme Court held that a claimant became a person entitled to compensation at the time of a work-related injury and that it was immaterial whether claimant was receiving compensation at the time of a third-party settlement. There were two sentences which the Supreme Court used to pinpoint its holding and which must be read together: "Cowart suffered an injury which by the terms of the LHWCA gave him a right to compensation from his employer. He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen." *Cowart*, ___ U.S. ___, 112 S.Ct. at 2595, 26 BRBS at 51-52 (CRT). We, thus, have a clear guide as to the meaning of a "person entitled to compensation" where we have an injured employee who has a potential compensation claim and who files a third-party suit which he settles as the only party-in-interest. However, as claimant and the Director assert, the Supreme Court in *Cowart* did not have before it the

question of whether a potential widow is a "person entitled to compensation" prior to the death of her husband, as in this case. Much was made of this issue by the administrative law judge and by the parties, including the Director, in their briefs. *Travelers Insurance Co. v. Marshall*, 634 F.2d 843, 12 BRBS 922 (5th Cir.1981), is cited to show a distinction between disability and death claims. In *Cowart*, the court was dealing with a traumatic injury to a hand. Under those circumstances the right to recovery vested at the time of injury. In *Travelers*, however, the court pointed out that although the source of liability for death benefits under the Act is traced back to a maritime injury, it is clear that a cause of action for death benefits under Section 9 of the Act does not arise until death. That is the time the cause of action for death benefits vests. Based on this rationale, I agree with Judge McGranery that Section 33(g)(1) is not a bar to claimant in this case.

There is an additional reason why the right to further compensation is not barred in this case. Section 33(g)(1) of the Act bars further compensation if the person entitled to compensation settles a third-party claim *for an amount less that [sic] the person would be entitled to under the Act* without first obtaining written approval of employer and its carrier. Here, however, the pre-death settlements were for a net amount greater than what Mr. Yates would have received under the Act. Strangely, this obvious fact was never mentioned by any of the parties, the Director, or the administrative law judge. As stated above, Mr. Yates entered into a Section 8(i) settlement of his claim with employer on May 5, 1983, for the lump sum of $15,000, medical benefits and attorney's fees. As a result of providing $454.50 in medical benefits, plus the lump

sum, the total compensation and medical costs amounted to $15,454.50, and this amount constituted employer's total lien in the third-party suit. According to the record, the gross amount of the lifetime settlements with Armstrong, Garlock, H.K. Porter, Inc., GAF, Owens-Corning Fiberglass and Owens-Illinois was $31,350, Emp. Ex. 13, less a 40 percent attorney's fee of $12,575, leaving a net to Mr. Yates of $18,785.[1] Employer had notice of the settlements, asserted its lien and was paid in full $15,454.50. The lien was paid in two installments, $14,127.59 on January 31, 1984, out of the pre-death settlements, and the balance of $1,327.29 on June 20, 1988, with proceeds from the settlement with Raymark, one of the approved post-death settlements. See Emp. Ex. 14. Since the Section 8(i) compensation settlement clearly determined and liquidated the amount of compensation to which Mr. Yates would be entitled and since the pre-death settlements were for a greater amount, and with employer receiving complete satisfaction of its lien, written approval of the settlements was not compelled by Section 33(g)(1). That section, therefore, would not bar a claim for further compensation by Mrs. Yates. As stated above, with the written approval of the three post-death settlements, there is no statutory bar to her right to further compensation.

II. Section 33(f)

I concur in the rationale of Judge McGranery's discussion of Section 33(f) and the conclusion that employer

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[1] The parties did not include in the computation the $10 token consideration in the settlement with Rockwool. *See* Emp. Ex. 23 setting forth the gross and net amounts of all settlements.

is entitled to offset only the amount received by claimant in the post-death settlements and not the amounts received by decedent's other heirs.

Upon the death of Mr. Yates, claimant's inchoate right to a possible death action became vested. She was then in the position of a "person entitled to compensation." Section 33(f) provides that when such person recovers from a third person, employer may be required to pay additional compensation in an amount determined by the Secretary over the net amount received by "such person" in the third-party actions. Clearly this refers solely to Mrs. Yates, and not the six adult children, who, because they were adult and nondependent, were not entitled to a possible claim under the Act and who, in fact, never filed a claim under the Act. *See Force v. Director, OWCP,* 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir.1991), *aff'g in part and rev'g in part Force v. Kaiser Aluminum and Chemical Corp.*, 23 BRBS 1 (1989) (in which the court held that Section 33(f) allows the employer to offset only that portion of a third-party settlement attributable to claimant). This view was also adopted by the United States Court of Appeals for the Fourth Circuit in *I.T.O. Corp. of Baltimore v. Sellman,* 967 F.2d 971, 26 BRBS 7 (CRT) (4th Cir.1992), *modifying on recon.*, 954 F.2d 239, 25 BRBS 101 (CRT) (4th Cir.1992), *cert. denied,* 113 S.Ct. 1579 (1993), wherein it adopted the view of the Ninth Circuit and held that employer's offset rights are limited to the portion intended for claimant.

Despite the literal reading of Section 33(f) and the interpretation by two Courts of Appeals, employer contends that the releases in the Raymark, Wellington and Johns-Manville cases executed by claimant and the six

adult children constituted a contract whereby employer was entitled to a complete offset of all monies received by all heirs rather than the one-seventh received by claimant. Employer, however, was not a party to the release agreements. It was not a signatory. They were entered into by claimant and the heirs, pursuant to a right granted by Mississippi statutory law, with three of the defendants in the third-party suit. Is employer contending it is a third-party beneficiary? It has not made any such assertion, nor does it appear that it would qualify. Such a contract must have been intended for the benefit of the third person. Absent such intent, the third person is merely an incidental beneficiary with no right to enforce the contract. The intent of the parties must be determined by the terms of the contract as a whole in the light of the circumstances under which it was made. The releases in question contain much more than the paragraph referring to credit. The body of each release is eight pages long covering, in boilerplate language, every conceivable claim, cause of action, lien, subrogation right, remedial right, direct or indirect, that could possibly be asserted against the third-party defendants, including any such action by Ingalls Shipbuilding, Incorporated, the employer in this case. *See generally* 17A Am.Jur.2d Contracts, §§440, 441. Clearly, the intent of the releases was to protect Raymark, Wellington and Johns-Manville from any and all possible actions arising as a result of Mr. Yates' exposure to asbestos during the course of his employment. The releases were not for the benefit of Ingalls other than incidentally, and as a matter of law they do not benefit Ingalls over and above what is

already contained in the provisions of Section 33(f) of the Act.

Of particular interest as to the intent of the releases, there is an acknowledgment in the record, employer's own exhibit, identified as Emp. Ex. 21 p. 17 of 57, which strangely has not been mentioned by anyone so far in this case. The acknowledgement, executed by claimant on April 27, 1988, in connection with the settlement with Raymark, one of the three post-death settlements, states her understanding that if successful in her compensation claim against Litton Systems, Inc. (actually the Ingalls subsidiary of Litton) that Litton *"will be given credit for the amount of money paid to me by Raymark* and that Litton will owe no further compensation "until the amount *received by me* from the above mentioned Defendant has been exhausted. . . . " [emphasis added]. This acknowledgement is evidence of claimant's understanding that only the amount she received would be credited to the offset.

I further concur with Judge McGranery who agrees with the Director that to interpret the releases in the post-death settlements to give credit of the entire net proceeds would be tantamount to a waiver of claimant's compensation that is precluded by Section 15(b) of the Act.

Accordingly I, too, would modify the administrative law judge's Decision and Order to reflect that employer is entitled to offset only claimant's one-seventh net share of the post-death settlements against its compensation liability and affirm the Decision and Order in all other respects.

SMITH, Administrative Appeals Judge, concurring and dissenting:

I fully agree with the lead opinion affirming the administrative law judge's determination that claimant was not "a person entitled to compensation" at the time of the pre-death settlements and, thus, that Section 33(g)(1) does not bar claimant's claim for death benefits. I respectfully dissent, however, from my colleagues' holding that claimant is entitled to an apportionment of the proceeds of the post-death settlements, such that employer is entitled to offset only the net amount claimant received from those settlements, not the amounts decedent's heirs received. I agree with the administrative law judge's findings on this issue, and would hold that by virtue of the specific language contained in the post-death settlements, claimant waived her right to apportionment.

The administrative law judge found that by operation of Mississippi law, claimant was entitled to an apportionment of the proceeds of the post-death settlements. *See* Decision and Order at 18. The majority points out that Section 33(f) of the Act, 33 U.S.C. §933(f), mandates such an apportionment as well. I am not in disagreement with these views. It is with regard to the applicability of Section 15, 33 U.S.C. §915, and its relation to the settlements, that I part company with the majority's opinion. The majority holds that even if the administrative law judge correctly construed the language in the post-death settlements as a waiver of claimant's right to an apportionment, enforcement of such language would be in violation of Section 15 of the Act. Section 15(a) and (b) of the Act provide:

> (a) *No agreement by an employee* to pay any portion of premium paid *by his employer* to a carrier

> or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid, and *any employer* who makes a deduction for such purpose from the pay of *any employee* entitled to the benefits of this chapter shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000.
>
> (b) No agreement *by an employee* to waive his right to compensation under this chapter shall be valid.

33 U.S.C. §915(a), (b) (emphasis added). Read together, I believe Section 15 invalidates agreements between only employees and their employers, in situations where the employer either deducts pay from the employee for the purpose of contributing to his own compensation, or where the employee seeks to waive his right to compensation. Based upon this interpretation of Section 15, I do not believe that this section of the Act is applicable to the instant case, as claimant was not an employee of employer. Moreover, the post-death settlements were agreements between claimant, decedent's heirs and three third-party defendants; employer was not a signatory to these agreements. Thus, a strict reading of Section 15 dictates that this section does not apply to the instant situation.

The language of the post-death settlements, as cited by the majority, does appear to waive claimant's right to an apportionment of the post-death settlements, a waiver that has been recognized by the United States Court of Appeals for the Fifth Circuit in *St. John Stevedoring Co.,*

Inc. v. Wilfred, 818 F.2d 397 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987). I believe that Section 15 does not invalidate this waiver. Accordingly, I would affirm the administrative law judge's finding and hold that as a matter of contract, employer is entitled to a credit of the entire net proceeds of the post-death settlements, not just claimant's one-seventh share.

In the Matter of MAGGIE YATES, SURVIVING WIDOW OF JEFFERSON YATES, Claimant v. INGALLS SHIPBUILDING INC., Employer and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, IN LIQUIDATION BY AND THROUGH THE MISSISSIPPI INSURANCE GUARANTY ASSOCIATION, Carrier	CASE NO.: 91-LHC-324 OWCP NO.: 6-59522

SYLLABUS

Digest Section

3601; 3706 The ALJ found that claimant's joinder in third party partial settlements prior to decedent's death did not bar, under Section 33(g), her subsequent claim for death benefits under the Act. Insofar as potential widows are concerned, Congress did not intend the words "person entitled to compensation" to encompass them. Therefore, they are exempt from the requirements of written approval prior to their husbands' death. Accordingly, Section 33(g)(1) was inapplicable to the settlements of claimant's cause of action against the third

party defendants. The claim was not barred by Section 33(g)(2) since employer not only received notice of all the settlements, but also reaped the benefit of them, having received proceeds from the pre-death settlements, as well as the wrongful death settlement, as reimbursement for its 1983 settlement with decedent.

1801[7][a]; 3704 Claimant's attorney fee, which was based on a 40% contingency fee contract, was reasonable. Therefore, the full amount of such fee shall be deducted as an expense in determining the net amount of claimant's third party recovery under Section 33(f) of the Act. Additionally, employer's lien and/or credit for the net amounts of the post-death third party partial settlements extended to net amounts received by non-dependent heirs-at-law of decedent, due to the contractual obligations of those settlements.

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BEFORE: QUENTIN P. McCOLGIN
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This is a claim for death benefits pursuant to the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.* (the Act). Maggie Yates, surviving widow of Jefferson Yates, seeks death benefits from her deceased husband's employer, Ingalls Shipbuilding, Inc., and its carrier, Mississippi Insurance Guaranty Association for injuries he sustained as a result of his employment.

This case was referred to the Office of Administrative Law Judges on October 30, 1990. The matter was called for formal hearing on June 7, 1991. The parties were afforded an opportunity to present evidence and argument in support of their respective positions at the hearing. Briefs were submitted by the parties' post-hearing. To the extent that proposed findings are not adopted, they are rejected as either inaccurate or unnecessary for the disposition of this case. Having considered all of the evidence presented, the undersigned does hereby issue the findings, conclusions and order set forth below.

STIPULATIONS

At the outset of the hearing, the parties stipulated that:

1. Decedent was diagnosed with asbestosis on April 17, 1981, and he died on January 28, 1986.

2. Decedent died due to asbestos exposure.

3. An employer-employee relationship existed at the time of injury.

4. The injury arose in the course and scope of employment.

5. Employer was notified of the injury on April 17, 1981 and of the death on April 22, 1986.

6. Notice was given pursuant to Section 12 of the Act to employer on April 17, 1981 (injury) and April 22, 1986 (death), and to the Secretary on April 17, 1981 (injury) and April 22, 1986 (death).

7. Controversions were filed on May 1, 1981 and May 21, 1986.

8. No informal conference was held.

9. Disability resulted from the injury; however, the claim was settled pursuant to Section 8(i) of the Act on May 5, 1983.

10. Medical benefits were paid in the amount of $820.15 pursuant to Section 7 of the Act.

11. Decedent received an 8(i) settlement in the amount of $15,000.00 plus open medicals and an attorney fee of $2,025.00 on May 15, 1983.

12. Decedent's average weekly wage was $228.12.

13. Decedent reached maximum medical improvement on April 17, 1981.

14. Claimant was retired at the time of the asbestosis diagnosis.

15. None of decedent's children were dependent upon him at the time of his injury and death.

(JX-1; Tr. p. 37).

ISSUES

At the time of the formal hearing, the following issues were in dispute:

1. Does the claimant's joinder in third party partial settlements prior to decedent's death bar her subsequent claim for death benefits under Section 33(g) of the Longshore Act?

2. Were claimant's attorney's fees for the third party settlements, based on a 40% contingency fee contract, unreasonable?

3. Does employer's lien and/or credit for net third party partial settlements extend to net amounts received by non-dependent heirs-at-law of decedent?

STATEMENT OF THE CASE

The decedent, Jefferson Yates, worked for employer as a shipfitter for varying periods beginning in 1953 and ending on September 19, 1967. (RX-1). Subsequently, the decedent worked at various non-maritime employment until he voluntarily retired in 1974 at the age of 67. (RX-2).

On March 23, 1981, decedent was evaluated for asbestos-related diseases. At that time, medical tests revealed a small density in the lung, pleural thickening as

well as small nodular disease in both lower lungs. Subsequent pulmonary function studies revealed restrictive pulmonary impairment and moderately decreased pulmonary diffusion capacity. Decedent was therefore diagnosed as having asbestosis, chronic bronchitis and possible malignancy of the lungs. He was admitted to Springhill Memorial Hospital in Mobile, Alabama for fibrotic bronchosopy [sic] and a transbronchial biopsy. Because of the resulting findings, a mediastinoscopy was performed. Bronchogenic carcinoma was suspected, but never confirmed. (RX-2).

On April 16, 1981, decedent filed a claim for benefits aginst [sic] employer under the Longshore Act. (RX-4). On May 26, 1981, he filed a third party lawsuit in the United States District Court for the Southern District of Mississippi, Southern Division, seeking damages against twenty-three (23) manufacturers of asbestos products to which decedent was exposed at employer's facility. (RX-7; Tr. p. 30). Claimant was not a party plaintiff in this third party action. Answers denying liability on the part of those third party defendants were filed in the Federal Court. (RX-21). Similarly, employer controverted the claim for compensation under the Longshore Act. (RX-6).

Some time after the filing of the third party lawsuit in Federal Court, some of the third party defendants began concluding partial settlements with both decedent and claimant. Although, as is shown by this record, claimant was never named as a plaintiff in the third party action, she signed all the settlements as a releasor. Pursuant to the agreed contingency fee contract, attorney for claimant received a 40% contingency fee from each partial settlement in addition to costs. (RX-13; Tr. p. 38).

On June 8, 1982, employer admitted the compensability of decedent's Longshore Act claim and tendered benefits. (RX-10). On May 5, 1983, an §8(i) settlement was obtained in his longshore case. The terms of the settlement awarded $15,000.00 as a lump sum to decedent, with open medical benefits for him, and an award of attorney fees in the amount of $2,025.00. (RX-11). Payment was made by employer pursuant to an Order of May 10, 1983. (RX-12).

However, during decedent's lifetime and before the employer admitted the compensability of decedent's longshore claim, decedent entered into the following third party partial settlements on the following dates for the following gross and net amounts:

Combustion Engineering, Inc.	05/13/81	$1,500.00	$650.00
Armstrong Cork Company	03/29/82	$ 500.00	$300.00
Garlock, Inc.	05/20/82	$ 300.00	$180.00
Rockwool Manufacturing Co.	05/20/82	$1,200.00	$720.00

After employer admitted the compensability of decedent's longshore claim, but before the §8(i) settlement was reached, decedent entered into the following third party partial settlement on the following date for the following gross and net amount:

H.K. Porter Co., Inc.	05/21/83	$7,250.00	$4,350.00

After the §8(i) settlement was entered and paid, decedent received third party partial settlements from the following third party defendants:

GAF Corporation	01/11/84	$6,000.00	$3,600.00
Owens Corning Fiberglass	01/30/84	$14,300.00	$8,580.00
Owens Illinois Inc.	01/31/84	$3,000.00	$1,775.00

(RX-13; RX-23).

Although in some of the earlier third party settlements, the language chosen limited claimant's release of claim to that of loss of consortium (RX-13 at pp. 1-4, 12-16), other settlements were clearly written to foreclose claimant from subsequently initiating a wrongful death action. Nevertheless, none of the settlements attempted to foreclose employer from bringing its own third party suit. (RX-13 at pp. 7-10, 17, 20-21).

In January 1986, decedent's condition deteriorated and he died on January 28, 1986. (RX-15; RX-16; Tr. p. 23). At the time of decedent's death, employer had paid approximately $454.50 over and above credits in medical benefits. Employer's lien was reimbursed out of three third party settlements. Two of the settlements were entered into before claimant's death; the last one afterwards. (RX-14).

On April 22, 1986, decedent's widow filed her claim for death benefits under the Act. (RX-17). The six natural children of decedent had long been adult non-dependents and thus were not joined in the claim. (Tr. p. 37). Employer controverted her claim on May 21, 1986, pending further investigation. (RX-18).

After decedent's death, the widow and her six children continued the Federal Court action which converted from a personal injury action to a wrongful death suit. The widow and children obtained the following wrongful death partial settlements from the following third party defendants on the following dates and listed gross and net amounts:

Raymark	05/10/88	$ 2,821.00	$ 1,880.67
Wellington	04/05/89	$60,000.00	$36,000.00
Johns-Manville	06/19/89	$43,000.00	$25,800.00

(RX-23).

LS-33 forms were filed on these third party partial settlements and were approved by employer. (RX-22).

Subsequently, employer reached the assumption that it could count, as a credit, all of the net proceeds from the wrongful death third party partial settlements. Employer thus concluded that it would be a "mathematical impossibility" that it would ever have to pay any benefits to claimant, in light of her age of 83, compared to the total net amount of the wrongful death partial settlements. Therefore, believing that the widow would not outlive the credit, employer, on October 13, 1988, filed a Motion to Amend its Answer, admitting the compensability of the widow's death claim and seeking a dismissal of the claim. (RX-24).[1]

In response, claimant informed employer that her share of the net amounts from the wrongful death third

[1] Notably, employer had already admitted the compensability of the claim by signing the LS-33 for the Raymark settlement. (RX-22).

party partial settlements was only one-seventh (1/7) due to the Mississippi Wrongful Death Statute, and therefore asserted that only her share of the net third party proceeds could be counted as a set-off for employer's liability to her for death benefits. (Tr. pp. 27-28).[2]

It is at this point that the Matter comes for resolution.

DISCUSSION

Does the claimant's joinder in third party partial settlements prior to decedent's death bar her subsequent claim for death benefits under Section 33(g) of the Longshore Act?

Section 33(g) of the Act provides that

> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this subsection for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the

[2] Accompanying her post-trial brief, claimant submitted copies of checks made out to her and her children from her attorney, allegedly showing the distribution of the Wellington and Johns-Mansville settlements. Those copies have not been admitted into evidence, as they were submitted after the record was closed, and no good cause was shown for their late admission. 29 C.F.R. §18.55 (1990). Further, such copies would not be entitled to any weight, as they are not copies of cancelled checks, but rather copies of unsigned checks.

employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). Approval shall be made on a form provided by the Secretary and shall be filed in the Office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlements obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payment or acknowledged entitlement to benefits under this Act.

33 U.S.C. §933 (1988).

The Board has long held that the meaning of "person entitled to compensation" under §33(g)(1) is limited to one who is actually receiving compensation from employer at the time a third-party settlement is entered into. *Cowart v. Nicklos Drilling Co.*, 23 BRBS 42 (1989), rev'd in part, 907 F.2d 1552, 24 BRBS 1 (CRT) (5th Cir. 1990); *Armand v. American Marine Corp.*, 21 BRBS 305 (1988) (addressing 1984 Amendments); *Dorsay v. Cooper Stevedoring Co.*, 18 BRBS 25 (1986). The Board has distinguished this holding under §33(g)(1) from §33(g)(2) and §33(f), the offset provision, wherein it has held that any claimant, including a potential widow, is a "person entitled to compensation" due to §33(g)(2)'s qualifying language. *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), aff'd in part, rev'd in part, *Force v. Director,*

OWCP, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991); *Armand v. American Marine Corp.*, 21 BRBS 305 (1988); *Castorina v. Lykes Brothers Steamship Co.*, 21 BRBS 136 (1988). The Board has justified this distinction as preventing a claimant from obtaining a double recovery under §33(f), yet protecting him from the harsh result of no recovery under §33(g)(1). *Force, supra*, 25 BRBS (CRT) at 18; *Force, supra*, 23 BRBS at 4-5; *Castorina v. Lykes Brothers Steamship Co., Inc.*, 21 BRBS 136, 140-1 (1988); *Dorsey, supra*.

Despite this reasoning, the Fifth Circuit Court of Appeals has emphatically rejected the Board's position. In *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir. 1991) (en banc), *aff'g* 907 F.2d 1552, 24 BRBS 1 (CRT) (5th Cir. 1990) and *Petroleum Helicopters, Inc. v. Barger*, 910 F.2d 276 (5th Cir. 1990), the Fifth Circuit held that a literal reading of §33(g) did not provide for a distinction between those claimants receiving and those claimants not receiving benefits. The Fifth Circuit held all employee and widow claimants to the requirement of prior written approval. *Id.*, 927 F.2d at 832, 907 F.2d at 1554.

While recognizing that the Fifth Circuit has indicated that the matter is closed, *Id.*, 907 F.2d at 832, neither *Nicklos* nor *Barger* involved the situation of a *potential* widow. In *Barger*, decedent was killed during the work accident and thus no uncertainty existed as to his death. *Id.*, 910 F.2d at 276. Further, in a case in which the Fifth Circuit had been faced with a claim in which the wife had settled before her husband's death, the court noted that it did "not disagree necessarily with the reasoning of the [Board]," which in that case had held that the potential

widow was not a "person entitled to compensation" means one receiving benefits. *John Stevedoring Co. v. Wilfred,* 818 F.2d 397 (5th Cir. 1987). Therefore, the undersigned finds that, at least insofar as potential widows are concerned, Congress did not intend the words "person entitled to compensation" to encompass them and they are thereby exempt from the requirement of written approval prior to their husbands' death. A cursory review of several provisions of the Act and corresponding regulations support this finding.

Unlike injured employees, a spouse of an injured employee has no cause of action under the Longshore Act until the injured employee dies from his work-related injury. A claim for death benefits would be premature if brought before the death occurred as no case or controversy would have yet arisen. 33 U.S.C. §908, §909 (1982). Under the present Act, the death must be related to the work injury in order for the widow to have a claim. 33 U.S.C. §909 (1988).[3] Until her husband's death, claimant could not relate this job-related disability to his death. Further, she could not have known ahead of time that she would outlive her husband, or that she would still be his wife at the time of his death.

The Secretary's regulations state that "[a]n agreement among the parties to settle a claim is *limited* to the rights of the parties and *to claims then in existence;* settlement of

[3] The 1984 Amendments deleted the provisions in §8 and §9 permitting an award for death benefits, no matter the cause of death, if the claimant was permanently disabled, with a non-schedule loss, due to a work injury at the time of death. 33 U.S.C. §908, §909 (1982).

disability compensation or medical benefits shall not be a settlement of survivor benefits nor shall the settlement affect, in any way, the right of survivors to file a claim for survivor's benefits." 20 C.F.R. §702.241 (1990) (emphasis added). This regulation corresponds with case law. A widow's claim has been held to be separate and distinct from that of her husband, such that his settlement with employer for disability benefits does not foreclose a later claim by her for death benefits. *Puig v. Standard Dredging Corp.,* 599 F.2d 467, 10 BRBS 531 (1st Cir. 1979); *Abercrumbia v. Chaparral Stevedores,* 22 BRBS 18 (1988); *Oceanic Butler, Inc. v. Nordahl,* 842 F.2d 773, 21 BRBS 33 (CRT) (5th Cir. 1988), *aff'g* 20 BRBS 18 (1987).[4]

[4] Employer cites *Holden v. Shea, S & M Ball Co.,* 23 BRBS 416 (1990), aff'd *Shea v. Director, OWCP,* 929 F.2d 736, 24 BRBS 170 (CRT) (D.C. Cir. 1991), for the proposition that decedent's claim for disability benefits and claimant's claim for death benefits are not separate and distinct as they both arose from the same injury. However, *Holden* does not stand for that proposition. The issue in *Holden* was whether claimant had a cause of action, and whether the Board had subject matter jurisdiction, due to a change in the law between the date of decedent's injury and the date of death. Under the 1972 Longshore Act, which was in effect in the District of Columbia until 1982 when the new District of Columbia Workers' Compensation Act became effective, death benefits were owed if decedent died while permanently totally disabled due to a work injury, regardless of the cause of death. The new District of Columbia Workers' Compensation Act did not provide for such a remedy, nor did it have subject matter jurisdiction because the work injury occurred before its effective date. Because of this, the claimant in *Holden* would not have been entitled to any death benefits if the law in effect at the time of death governed. Therefore, in order to grant claimant any relief, and following the case law of the district

While the facts in this case do not involve claimant seeking a settlement for death benefits with employer before her husband's death, 20 C.F.R. §702.241 (1990) and case law support claimant's contention that the deputy commissioner could not entertain any request from her prior to her husband's death. Moreover, the Act embodies the concept that her action for death benefits would not be recognizable until death occurred. Her claim for death benefits did not prescribe when her husband's claim for disability benefits would have. Throughout the Act, the date from which time periods begin to run for death benefits, is from the date of death, as opposed to the date of injury. 33 U.S.C. §§912, 913, 914, 919, 930 (1988).

As the Fifth Circuit pointed out in *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir. 1991) (en banc),

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and circuit in which it sat, the Board applied the General Savings Statute. That statute states, in pertinent part, that:

> The repeal of any statute shall not have the effect to release or extinguish any . . . liability incurred under such statute, . . . and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action . . . for the enforcement of such . . . liability.

1 U.S.C. §109 (1982). Thus, decedent's death was related back to the law in the effect at the time of his work injury. 23 BRBS at 419.

Clearly, the facts in *Holden* are not analagous [sic] to the case at hand, and its holding is not applicable. However, the Board's continued treatment of the widow's claim as separate and distinct from that of her husband's is noted.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id., 927 F.2d at 832, 24 BRBS (CRT) at 95, *quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984).

Here, the intent is clear. Congress did not confer a cause of action for Section 9 death benefits prior to the death of the injured employee. Congress protected the right to commence such claim by tolling the applicable time periods for notification and the statute of limitations. Nothing in the Act supports the contention that a potential widow could submit a Request for Approval of Third Party Settlement even if she wanted to. As such, claimant could not have been deemed a "person entitled to compensation" until the death occurred. A holding otherwise would destroy the integrity of the Act. Thus, the undersigned finds that at the time of the pre-death settlements, Section 33(g)(1) of the Act did not apply to

the settlements of claimant's cause of action against the third-party defendants.

Nevertheless, claimant was still required to provide employer with notice of the settlements prior to being awarded benefits by an administrative law judge in order to prevent her claim from being barred under §33(g)(2). *Dorsey v. Cooper Stevedoring Co., Inc.*, 18 BRBS 25 (1986); *Armand v. American Marine Corp.*, 21 BRBS 305, 309 (1988), *citing Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239, 243 (1988). "This construction of the statute protects employer's Section 33(f) lien interest by requiring that claimant, at a minimum, provide employer with notice of any settlement or judgment." *Cowart v. Nicklos Drilling Co.*, 23 BRBS 42, 46 (1989), *citing Mobley, supra.*

Here, employer not only received notice of all the settlements, but also reeped [sic] the benefit of them. Employer received proceeds from the pre-death settlements, as well as the wrongful death settlement with Raymark, as reimbursement for its 1983 settlement with decedent. Thus, claimant's claim is not barred by §33(g)(2).

Were claimant's attorney's fees for the third party settlements, based on a 40% contingency fee contract, unreasonable?

Under the 1972 Act,[5] in this circuit, claimant's attorney was entitled to recover some portion of his fee from

[5] The 1972 Act provided that if claimant received an award under the Longshore Act, his right against any third party was assigned to employer unless he commenced an action against such party within six months of the award. 33 U.S.C. §933(b) (1972). The Act provided a formula for the distribution of the

the employer and/or his carrier who benefitted from the attorney's services. Claimant's contract with his attorney did not automatically govern the terms of the employer/carrier's contribution, and a *quantum meruit* approach was used to calculate the fee owed by the employer/carrier. Absent a finding by the court that the fee contract between claimant and his attorney was unreasonable,[6]

employer's recovery in suits it initiated in an injured longshoreman's name under §33(b), but contained no formula for the distribution of proceeds when claimant was successful in a suit he initiated against the third party. 33 U.S.C. §933(e) (1972). The employer's lien against a claimant's recovery was a judicial, rather than a legislative, creation. *Allen v. Texaco, Inc.*, 510 F.2d 977, 979-980 (5th Cir. 1975).

[6] It has long been recognized that district courts may review contingency fee contracts, even *sua sponte*, based on their supervisory powers over the attorneys practicing before them. Contingency fee contracts are set aside when the fee is so exorbitant that its collection offends attorney disciplinary rules. ABA Code of Prof. Resp., DR 2-106(A); ABA Code of Jud. Conduct, Canon 3, subd. B(3); *Ainsworth v. Vasquez*, 759 F.Supp. 1467 (E.D. Cal. 1991); *Holbrook v. Andersen Corp.*, 756 F.Supp. 34 (D. Me. 1991); *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 921 F.2d 1371 (8th Cir. 1990) (Arkansas); *Pfeifer v. Sentry Ins.*, 745 F.Supp. 1434 (E.D. Wis. 1990); *In re Western Real Estate Fund, Inc.*, 922 F.2d 592 (10th Cir. 1990) (Oklahoma); *A Sealed Case*, 890 F.2d 15 (7th Cir. 1989) (Illinois); *In re Agent Orange Product Liability Litigation*, 818 F.2d 226 (2nd Cir. 1987) (New York); *Ochoa, supra*, 754 F.2d 1196 (5th Cir. 1985); *Boston & Maine Corp. v. Sheehan, Phiney, Bass & Green, P.A.*, 778 F.2d 890 (1st Cir. 1985) (Massachusetts); *McKenzie Const., Inc. v. Maynard*, 758 F.2d 97 (3rd Cir. 1985) (Virgin Islands); *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983) (New Mexico); *Hoffert v. General Motors Corp.*, 656 F.2d 161 (5th Cir. 1981) (Texas); *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir. 1980) (Minnesota); *Haverstuck v. Wolf*, 491 F.Supp. 447 (D.C. Minn. 1980); *Dunn v. H.K. Porter Co., Inc.*, 602 F.2d 1105 (3rd Cir.

claimant either paid the remainder of the fee to his attorney or his attorney remitted the debt. *Mitchell v. Scheepvaart Mattschappij Trans-Ocean*, 579 F.2d 1274, 1276, 1281-2 (5th Cir. 1978).

While not mandating a formulistic approach in determining reasonableness, the Fifth Circuit suggested factors used in the calculation of attorney's fees in civil rights cases as a guide. Those factors are:

1. the time and labor required;
2. the novelty and difficulty of the questions;
3. the skill requisite to perform the legal service properly;
4. the preclusion of other employment by the attorney due to acceptance of the case;
5. the customary fee;
6. whether the fee is fixed or contingent;
7. time limitations imposed by the client or the circumstances;
8. the amount involved; and
9. the experience, reputation, and ability of the attorneys.

Id., 579 F.2d at 1281 n. 10. *see also* ABA Code of Professional Resp., DR 2-106(B).

1979) (Pennsylvania); *Mitchell v. Scheepvaart Maatschappij Trans-Ocean*, 579 F.2d 1274, 1281-2 (5th Cir. 1978); *Leve v. Schering Corp.*, 73 F.R.D. 537 (D.C.N.J. 1975); *Schlesinger v. Teitelbaum*, 475 F.2d 137 (3rd Cir. 1973); *Cappel v. Adams*, 434 F.2d 1278 (5th Cir. 1970).

In *Ochoa v. Employers National Ins. Co.*, 724 F.2d 1171, 17 BRBS 49 (CRT) (5th Cir. 1984), vacated and remanded, 105 S.Ct. 583 (1984), aff'd 754 F.2d 1196 (5th Cir. 1985), the Fifth Circuit held that where an employee's third party recovery was insufficient to cover both his attorneys' fees and the compensation lien, the lien was payable out of the net recovery, after costs of litigation, including reasonable attorneys' fees, were subtracted. *See also Valentino v. Rickners Rederi, G.M.B.H., SS Etha*, 552 F.2d 466 (2nd Cir. 1977). This holding became codified in §33(f) through the 1984 Amendments.[7]

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[7] The Bill to amend the Act, S. 1182, originally read that Section 33(f) was to be amended as follows:

"(f)(1) If the person entitled to compensation institutes proceedings within the period described in subsection (b) of this section, the employer shall be required to pay as compensation under this Act a sum equal to any amount by which the amount which the Secretary determines is payable on account of such injury or death exceeds the amount recovered in such proceedings against any such third person.

"(2) Any amount recovered by the person entitled to compensation on account of such proceedings by judgment or settlement, whether or not the settlement is approved by the employer in accordance with subsection (g) of this section, shall be distributed as follows:

"(A) The person entitled to compensation shall pay to the employer an amount equal to the sum of –

"(i) the cost of all benefits furnished to him by the employer under section 7; and

"(ii) all other amounts payable as compensation or benefits under this Act.

"(B) The person entitled to compensation or his representative shall retain the balance of the amount.

Section 33(f) states that

> If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C. §933(f) (1988).

Published cases show the deduction of attorneys' fees routinely being made. *See e.g., Maples v. Textports Stevedores Co.*, 23 BRBS 302, 304 (1990), *aff'd Textports Stevedores Co. v. Director, OWCP*, 931 F.2d 331 (5th Cir. 1991). However, the issue of the reasonableness of those fees has never been addressed in the context of adjusting

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> "(3) The employer will receive credit for future compensation or medical benefits from the amount retained by the employee under paragraph (2)(B), before payment of attorney's fees and expenses, and such credit shall be the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule provided by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner."

Hearings Before the Subcommittee on Labor of the Committee on Labor and Human Resources, 97th Congress, 1st Sess. 12 (1981).

the offset under the 1984 Amendments.[8] Although in Ochoa, the Fifth Circuit directed that in every case involving distribution of a longshoreman's tort recovery, the district court should assess the reasonableness of the longshoreman's attorney's fee, it did not set forth a standard. Presumably, the standard developed under the 1972 Act would still apply. That standard is now applied by the undersigned, even though it is not certain that Congress meant to confer upon administrative law judges the authority to address this issue which has always been in the domain of the district judges handling the third party suits.

Claimant submitted that the 40% contingency fee contract between her and her attorney in the third party suit was reasonable and a standard amount throughout the legal profession for a personal injury action.[9] Additionally, claimant explained that due to the consolidation

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[8] In *Ochoa, supra*, it was held that if no proceeds remain after the out of pocket litigation expenses, attorneys fee, and compensation lien are paid, the court "may make an equitable adjustment of the recovery award between [claimant and his attorney]." 754 F.2d at 1198. This adjustment of the attorneys fee did not increase the offset to employer; claimant was the sole beneficiary. *Id. See also Strachan Shipping Co. v. Melvin*, 327 F.2d 83 (5th Cir. 1964); *Scozzari v. Jade Co.*, 350 F.Supp. 801 (E.D.N.Y. 1972).

[9] Claimant did not allege that employer should be precluded from contesting the fees, even though the facts would warrant such a preclusion based on estoppel by acts and declarations, or even based on ratification.

"An 'estoppel by acts and declarations' is such as arises from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself." Black's Law Dictionary 495 (5th ed. 1979). In this instance, by

of her claim with many others under lead cases, any discovery and investigation done for the lead case applies to all cases in that group. (Claimant's post-trial brief at pp. 9-10; JX-2).[10] It is not possible to discern from the

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not objecting to the fees when accepting the benefits of the first three settlements, which occurred before claimant's husband died, employer induced claimant and her attorney to continue the third party suit after her husband's death under the belief that the 40% contingency fee was acceptable to employer.

Ratification arguably occurred because, even though no principal-agent relationship existed between employer and claimant, employer benefited from claimant's procurement of an attorney to continue the third party suit. Ratification is "[t]he affirmance by a person of a prior act which did not bind him, but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." Black's Law Dictionary 1135 (5th ed. 1979). Had claimant abandoned the suit, employer would not have received part of the Raymark settlement nor be entitled to a credit against future benefits.

[10] At the conclusion of the hearing, the parties agreed that employer would obtain and submit a certified copy of the entire court file in the third party suit. Exhibit JX-2 was left open for the admission of this evidence. (Tr. pp. 56-57). Employer subsequently admitted a copy of the *Yates* docket sheet on file with the Clerk of the U.S. District Court for the Southern District of Mississippi. Employer did not submit any copies of the docket sheets of the lead cases under which *Yates* had been consolidated, including *Harris*, *Hart*, and *Chapin*, although this consolidation was made known at the hearing.

Upon knowledge of the incompleteness of Exhibit JX-2, claimant submitted copies of the docket sheets for the *Harris* and *Hart* lead cases on September 20, 1991 and for the *Chapin* case on October 18, 1991. These submissions were made before employer submitted a rebuttal brief on November 1, 1991.

Although claimant's submissions were not made within the time limits listed in 29 C.F.R. §18.55 (1990), they are nevertheless

sheets whether claimant's attorney worked on any of the lead cases, or participated in any of the discovery. (JX-2).

Employer submitted that a minimal amount of work was involved in the third party suit. Although claimant recalled going to federal district court in Mississippi on one occasion, she testified that she never had to give a deposition or a recorded statement. Additionally, there was no hearing or a trial. (Tr. pp. 38-39). Employer argued that since the third party suit was a mass tort litigation allegedly involving little work as evidenced by the *Yates* docket sheet, a 25% contingency fee would be reasonable. However, employer produced no evidence, nor even an allegation, that the 40% contingency fee was greater than that normally and customarily charged by attorneys in this region.[11]

As noted above, district courts have the supervisory power to review and disturb contingency fees contracts based on ethical considerations, and on §33(f) of the Act. Additionally, they have the expertise to readily make a reasonableness determination. Thus, the undersigned finds that the non-disturbance of an attorney fee by the district court is presumptive evidence that the fee was reasonable. As such, the burden then shifts to employer to come forward with substantial evidence, in this proceeding, that the fee was unreasonable.

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admitted due to the misleading nature of employer's statement that he would submit a copy of the *entire* record.

[11] Further, if the attorney fee was patently unreasonable, one could assume that the third party tortfeasors would have raised the issue, as they have an interest in ensuring that the greatest offset is given.

As stated earlier, employer emphasized the lack of evidence that a substantial amount of work was performed in the third party suit. However, a significant difference exists between hourly fees and contingency fees, and the reasonableness of each must be judged with that difference in mind. While the time expended in hourly fee contracts is of the utmost importance in determining the reasonableness of fees under them, it is of less importance in contigency [sic] fee contracts. Thus, employer's evidence on this factor alone is insufficient to find claimant's attorney's fee unreasonable, and it is therefore found that claimant's attorney fee, which is based on a 40% contingency fee contract, is reasonable. As such, the full amount of such fee should be deducted as an expense in determining the net amount of claimant's third party recovery under §33(f) of the Act.

As a final note on the issue, claimant's equal protection argument should be addressed. Claimant argued that §33(f) may be unconstitutional in that it serves to deny claimant equal protection under the law.[12] Claimant

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[12] Claimant additionally argued that §28 (attorney fees for services rendered under the Act) may be unconstitutional.

In regards to §28(a) and (b), claimant's argument has no merit as those provisions pertain solely to determining an amount that employer, a nonconsensual party, should be ordered to pay. Due to its humanitarian purpose, the Act provides that employer and/or its carrier is to pay claimant's attorney a reasonable fee, when claimant's action is successful. This is a statutory departure from the American Rule, which mandates that each party is liable for its own attorney fees.

Section 28(c) addresses the possibility of claimant being held to pay a portion of or all of his attorney fees. Thus, the Act recognizes that claimant's attorney may not limited [sic] to the

submitted that the Act does not provide for review of the fees charged to employer by its own attorney.

All attorneys are held to the ethical rules binding in their respective states. The ABA Code of Professional Responsibility states that a "lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." *Id.*, DR 2-106(A). The ABA Code of Judicial Conduct provides that a "judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." *Id.*, Canon 3, subd. B(3). *See also* cases cited under footnote 6, *supra*. While §33(f) may provide employer with a convenient ground to raise the issue of claimant's attorney's fees, the fact remains that

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fee he receives under §28(a) or (b), depending on the circumstances of the case. Cases decided before the 1984 Amendments show that claimant himself may be liable for fees incurred prior to employer's notification and refusal to pay, as well as prior to a controversy arising. *See Portland Stevedoring Co. v. Director, OWCP*, 552 F.2d 293, 6 BRBS 61 (9th Cir. 1977); *Jones v. The Chesapeake & Potomac Telephone Co.*, 11 BRBS 7 (1979); *Trachsel v. Brady-Hamilton Stevedore Co.*, 15 BRBS 469 (1983). To the extent that the 1984 Amendments, particularly §28(e), eliminate this possibility, claimant's argument may have merit.

It should also be noted that, to the extent that awards of attorney fees under the Act determine what claimant's attorney can *reasonably* charge for his services, claimant's attorney cannot seek from his client the difference between his contractual rate and a lower rate awarded by the agency. ABA Code of Prof. Resp., DR 2-106(A). DR 2-106(B) provides the standard from which a reasonable fee is determined. If a court awards a lesser fee than that requested, an attorney may have grounds for appeal if that court did not consider all the factors in DR 2-106(B).

the practice of all attorneys is subject to scrutiny. In return for a license to practice from a state, and admission by courts to practice before them, an attorney waives many of the privacy and contractual rights that other members of society continue to enjoy. If claimant is aware that employer's attorney is charging an excessive fee, he can bring that to the attention of the judge. Claimant does not need a provision in the Longshore Act in order to do so.

Does employer's lien and/or credit for net third party partial settlements extend to net amounts received by non-dependent heirs-at-law of decedent?

Employer has argued that claimant is not entitled to an apportionment of the post-death third party settlements under operation of law. Employer submitted that the purpose of §33 of the Act is to place the ultimate liability for injury on the third party entity, who ultimately caused the claimant's harm and, thereby, protect the employer, who is subject to absolute liability under the Act. Employer continued that a recognized apportionment between claimant and her children would be contrary to both of these themes, and would thereby, discourage settlements under the Act. Additionally, employer alleged that claimant is attempting to get her third party settlement and keep it, thereby not making the employer whole, and that she would be receiving a double recovery.

Employer's argument is rejected, as federal and state law provides for the apportionment of the suit between claimant and the six children. Claimant's third party wrongful death suit was brought in federal court based

on diversity of citizenship. *Erie Railroad v. Thompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and its progeny, require that the federal district court apply the state law in which it sits. Mississippi's wrongful death statute provides that "[d]amages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children, all shall go to his wife." Miss. Code Ann. §11-7-13 (1972). Claimant testified that she has six children and that each one of them received one-seventh (1/7) of each settlement as required by Mississippi law. (Tr. pp. 27-28).

Employer's argument that claimant is attempting to obtain a double recovery under the Act presupposes that those shares declared by Mississippi law to be the property of the children of the deceased actually go to claimant. Further, the evidence in this record shows that only one-seventh (1/7) of each settlement went directly to claimant. (CX-1; Tr. pp. 27-28). Whether or not any of her children gave claimant their share is immaterial. Such a gift is not a sum claimant herself recovered under the third party action.

Unlike the situations in *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35, 40-41 (1990), *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46, 58 (1990), *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1, 3-4 (1989), and *Lustig v. United States Department of Labor*, 881 F.2d 593 (9th Cir. 1989), the settlement here is clearly apportioned between the appropriate *parties*, and claimant has made no claim concerning apportionment according to the types of *damages* she received, such as loss of consortium. No speculation is involved in either determining claimant's share or the amount of the offset.

Nevertheless, employer's argument that the terms of the settlement agreements entitle it to offset the total amounts of the settlements is meritorious. The settlement with Raymark Industries, Inc., dated June 9, 1987, which claimant signed on that date, states in pertinent part that:

> Releasors do hereby represent and warrant to Releasees that whether there is now pending any claim for worker's compensation benefits under any state or federal law or statute, including but not being limited to the Mississippi Workers' Compensation Act or the Federal Longshoremen's and Harbor Workers' Act, or if any such claim shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to *any Releasor* shall first be given *credit for the consideration paid to Releasors* under this agreement, less reasonable cost of collection, and shall make no payment of any compensation benefits to *any Releasor* until the *consideration paid to Releasors* under this agreement is exhausted.

(RX-21 at p.5).[13]

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[13] Although an acknowledgement signed by claimant on April 27, 1988 varies from the above in that claimant acknowledges only that employer would "be given credit for the amount of money paid to [her] by [Raymark], and that [employer would owe her] no Workmen's Compensation benefits or medical benefits . . . until the amount received by [her] from the above mentioned Defendant has been exhausted based on the weekly benefits due [her from employer]. . . . " (RX-21 at p. 17), such an acknowledgement cannot vary the terms of the settlement which claimant had previously signed.

The Wellington "Final Judgment Approving Settlement and Dismissing with Prejudice", dated April 12, 1989, states that:

> The Court finds that the above offer of settlement is reasonable and in the best interest of said parties, and it is therefore, approved, provided that if any claim be pending or hereafter filed by the plaintiff, the decedent's heirs, or anyone in privity with them for benefits under the Mississippi Workers' Compensation Act, the Federal Longshoremen's and Harbor Workers' Compensation Act, or any other law which provides benefits to be paid by the decedent's employer, and/or insurance carrier, and any such employer and/or insurance carrier be ordered to pay such benefits resulting from or in any way related to any matter, fact, or thing appearing in the Complaint filed in this cause, then under the provisions of the applicable compensation act such employer and/or its insurance carrier shall first be given *credit for the net amount* of the aforesaid sum *accruing to the plaintiff and the decedent's heirs.*

(RX-21 at pp. 20-21; *see also* RX-21 at pp. 22-23). The settlement itself, dated April 5, 1989, uses the same language as in the Raymark settlement. (RX-21 at pp. 31-32).

The Manville Corporation settlement, dated March 3, 1989, incorporated strikingly different language. It states that:

> The undersigned further agree to be responsible for the required reimbursement of all outstanding medical bills and/or worker compensation benefits paid to or on behalf of the undersigned to date, and shall indemnify

> and hold harmless the TRUST up to the amount of this settlement for any such sums adjudicated to be a lien upon this settlement.

(RX-21 at p. 46). However, in another part of the settlement, it uses a clause similar to that in Raymark, which gives employer credit for the entire amount of the net proceeds. (RX-21 at pp. 47-48).

Thus, with respect to all three post-death settlements entered into by claimant and the surviving children of the decedent, it is found that claimant is contractually obligated to give employer credit for the entire amount of the net proceeds, and not only the one-seventh she received. While humanitarian principles may deem such clauses unconscionable and void as between employer and claimant,[14] as claimant did not receive the entire settlement monies, and ostensibly she may need compensation benefits to survive this contractual obligation is recognized in view of the holding in *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir. 1987).

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[14] As between claimant and the third party tortfeasors, these clauses are unquestionably valid and enforceable. Claimant agreed to the credit in exchange for the settlement monies. The settlement monies may have been considerably less had she not agreed to have her children's shares credited. However, the third party tortfeasors' only interest in the insertion of those clauses in the settlements was to ensure them as much credit as possible should employer sue them. Since employer's right against those tortfeasors is now prescribed, an argument could be made that the clauses are thus inapplicable.

Funeral Expenses

An itemized certification shows that claimant and her family spent $2,445.00 on funeral expenses. (RX-17 at p. 3). Section 9(a) provides that employer is liable for reasonable funeral expenses up to $3,000.00. As employer has not contested the reasonableness of these expenses, and as nothing in the itemized certification appears unreasonable, claimant is entitled to be reimbursed for the full amount of $2,445.00.

Attorneys Fees

Claimant's attorney is entitled to an award of attorney fees for his representation of this claim, despite his recovery of attorney fees under the third party settlements. *Petro-Weld, Inc. v. Luke*, 619 F.2d 418, 423-424, 12 BRBS 338 (5th Cir. 1980). Additionally, although it is unlikely that employer will ever have to pay claimant any amount under the death benefit due to the large offset, her attorney is still entitled to an award. *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990); *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1984).

Based on the foregoing findings and conclusions, the undersigned issues the following order.

ORDER

1. Employer and its carrier shall reimburse claimant $2445.00 for funeral expenses.

2. Employer and its carrier shall pay claimant death benefits in accordance with Section 9(b) of the Act commencing January 28, 1986 and continuing based on an average weekly wage of $228.12.

3. Employer and its carrier shall pay interest in accordance with 28 U.S.C. §1961 on all past due benefits.

4. Employer and its carrier shall receive credit pursuant to §33(f) for the net amount recovered by claimant and her six children from the settlements with the third parties which were approved by the carrier on September 16, 1987, March 4, 1988, and May 16, 1989 on LS-33 forms filed in the office of the District Director.

5. Counsel for claimant, within 20 days of the receipt of this order, shall serve and file a fully supported fee application. Opposing counsel is granted 20 days thereafter to respond with objections thereto.

Dated: April 2, 1992

Metairie, Louisiana

Section 33(f) and 33(g) of the LHWCA provide as follows in pertinent part:

> (f) If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees.)

33 U.S.C. § 933(f)

> (g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under § (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative.) The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within 30 days after the settlement is entered into. (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlements obtained from or judgment rendered

against a third person, all rights to compensation and medical benefits under this act shall be terminated, regardless of whether the employer or the employer's insurer has made payment or acknowledged entitlement to benefits under this Act.

33 U.S.C. § 933(g)

Renate CRETAN, Widow of John Cretan; Nicole Cretan, Daughter of John Cretan, Petitioners-Cross-Respondents,

v.

BETHLEHEM STEEL CORPORATION, Respondent-Cross-Petitioner,

and

Director, Office of Workers Compensation Programs, Respondent.

Nos. 90-70589, 90-70634.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 14, 1993.

Decided July 28, 1993.

Victoria Edises, Kazan, McClain, Edises & Simon, Oakland, CA, for petitioners-cross-respondents.

Joshua T. Gillelan, U.S. Dept. of Labor, Office of the Sol., Washington, DC, for the respondent; Bill Parrish, San Francisco, CA, Robert E. Babcock, Littler, Mendelson, Fastiff & Tichy, Portland, OR, for respondent-cross-petitioner.

Petition for Review of an Order of the Benefits Review Board.

Before: BROWNING, CHOY, and CANBY, Circuit Judges.

CANBY, Circuit Judge.

We have before us a survivors' petition and an employer's cross-petition for review of a Benefits Review Board decision and order that resolved the survivors' claim for disability compensation and death benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950. We have jurisdiction under 33 U.S.C. § 921(c). We affirm in part and reverse in part.

BACKGROUND

In 1942 and 1943, Bethlehem Steel Corporation (Bethlehem) employed John Cretan as an electrician engaged in the repair and construction of ships. John was exposed to asbestos on the job. Bethlehem was John's only maritime employer.

In January 1984, John learned he suffered from mesothelioma, a terminal asbestos-related disease. He died in February 1985. Before he died, John filed a timely claim for compensation and medical benefits under the Act. Bethlehem disputed liability. Two months after John's death his wife Renate and daughter Nicole claimed disability compensation as his survivors and death benefits in their own right. Bethlehem disputed those claims too.

Prior to his death, John had also brought a product liability action against a number of asbestos manufacturers. He settled his third-party claims in a series of agreements. Although neither Renate nor Nicole were

parties to John's action, each settled her potential claims for his wrongful death against the manufacturers at that time. Renate also settled, in the same series of agreements, an action which she had filed seeking recovery for loss of consortium. The net proceeds from the settlements were approximately $333,489. One asbestos manufacturer also bought a $50,000 annuity on behalf of the family.

An administrative law judge (ALJ) tried the Cretans' LHWCA claims after John's death. The ALJ awarded disability compensation and medical benefits to Renate as John's widow. Renate and Nicole also received death benefit awards. The ALJ rejected Bethlehem's argument that section 33(g) of the Act, 33 U.S.C. § 933(g), had terminated Bethlehem's liability to the Cretans because the family had failed to secure Bethlehem's written approval of the third-party settlements. The ALJ, however, permitted Bethlehem to offset a portion of the settlements against its statutory liability. Renate and Nicole had argued without success that the offset provision contained in section 33(f) of the Act, 33 U.S.C. § 933(f), was inapplicable to them.

The Cretans and Bethlehem each appealed to the Board. In addition to resolving other objections to the ALJ's ruling, the Board agreed that section 33(g) was no bar to the LHWCA claims. The Board also agreed that Bethlehem was entitled to credit under section 33(f). The Board concluded, however, that Bethlehem was entitled to a credit in the amount of the family's aggregate net tort recovery. We review the Board's decision for "errors of law and adherence to the substantial evidence standard," *Port of Portland v. Director, Office of Workers' Compensation Programs*, 932 F.2d 836, 838 (9th Cir.1991), and we may

affirm on any basis contained in the record. *National Steel & Shipbuilding Co. v. United States Dep't of Labor, Office of Workers' Compensation Programs*, 606 F.2d 875, 883 n. 4 (9th Cir.1979).

DISCUSSION

The Cretans and Bethlehem each raise several challenges to the Board's ruling. The dispositive questions, however, are whether Renate and Nicole were subject to sections 33(f) and (g). We conclude that they were, and that they consequently cannot recover under the LHWCA.

Section 33 of the LHWCA establishes a claimant's right to seek recovery from third parties without fear of being categorically denied compensation or benefits under the Act. This right, however, is qualified by subsections (f) and (g), which complement each other in important respects. Section 33(f) provides:

> If the *person entitled to compensation* institutes proceedings . . . the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against [a] third person.

33 U.S.C. § 933(f) (1988) (emphasis added). The import of this provision as a guard against double recovery is clear enough: the employer is entitled to set off against its liability any recovery that the person entitled to compensation received from third parties.

Subsection (g) provides in relevant part:

> If the *person entitled to compensation* . . . enters into a settlement with a third person . . . for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed. . . .

33 U.S.C. § 933(g)(1). The purpose of this provision is to protect the employer against the employee's entering an inordinately low settlement, which would deprive the employer of a proper set-off under section 33(f).

As a result of the interplay of sections 33(f) and 33(g), the Cretans will necessarily be precluded from any compensation recovery if they fall within the reach of both subsections.[1] They do not dispute that they failed to obtain the written consent of Bethlehem to the settlement. As a result, if their third-party recovery was less than they are entitled to under LHWCA, section 33(g) precludes any LHWCA recovery from Bethlehem. On the other hand, if their third-party recovery exceeded their entitlement under LHWCA, Bethlehem would be entitled to a 100% set-off under section 33(f).

The Cretans contend, however, that they do not fall within the scope of either subsection because both expressly apply only to persons "entitled to compensation." They argue that they were not persons "entitled to compensation" when they settled their tort claims

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[1] The Cretans conceded this proposition at oral argument.

because John had not yet died. Our resolution of this issue is complicated by the fact that in the past the Director has given the term "person entitled to compensation" different meanings in sections 33(f) and 33(g), and each meaning has changed over time.

With regard to section 33(f), the Cretans urge that the fact that they were not "entitled to compensation" at the time of the recovery precludes Bethlehem from taking any set-off. The ALJ and the Board each rejected that argument, and later we adopted the Board's position in another appeal. *See Force v. Director, Office of Workers' Compensation Programs*, 938 F.2d 981, 984-985 (9th Cir.1991). In *Force*, we deferred to the Director's view at that time that a claimant's status as a "person entitled to compensation" need not be fixed at any particular moment. Even though the entitlement to compensation arose after the settlement, it did eventually arise and the employer was entitled to its set-off. Id.

The Cretans argue, however, that Force is implicitly overruled by the Supreme Court's recent decision in *Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992). We disagree.

Cowart arose under section 33(g). There the claimant had been informed that he was entitled to benefits under the LHWCA, but no order had been entered and no payments had been made by the employer. *Id.* at ___, 112 S.Ct. at 2592. At that point, the claimant entered into a settlement, lower than his potential LHWCA benefits, with a third party. *See Id.* He did not obtain the prior written consent of his employer. *Id.* Before *Cowart* reached the Supreme Court, it had been the Director's

position that a claimant who had not yet received a compensation order and had received no payments was not a "person entitled to compensation" for purposes of section 33(g). *Id.* at ___, 112 S.Ct. at 2593-94. The Director reversed his position in the Supreme Court, *Id.* at ___, 112 S.Ct. at 2594, and the Court adopted the new position. The Court held that the term "person entitled to compensation" in section 33(g) was not limited to persons who had either obtained a compensation order or had received benefits. "Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated." *Id.* at ___, 112 S.Ct. at 2595. Accordingly, section 33(g) applied and the claimant was barred from recovering LHWCA benefits from his employer.

It is clear that the holding of *Cowart* does not dictate the outcome of our case. It does not rule on the question whether a claimant whose entitlement will mature upon a death that has not yet occurred is a "person entitled to compensation." *Cowart* does, however, contain language that in isolation appears to support the Cretans. In rejecting the view that *Cowart* did not become "entitled" until he obtained an order or a payment, the Court stated: "He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen." *Id.* at ___, 112 S.Ct. at 2595. The Court also stated that the normal meaning of entitlement is that "the person satisfies the prerequisites attached to the right." *Id.* The Cretans seize upon this language, and argue that their entitlement to compensation under the Act vested when

John died. There is no reason, however, to assume that the Supreme Court had the present situation in mind when it uttered these dicta. The Court's point was that an entitlement did not have to be reduced to order or payment to be an entitlement. The Cretans give the vesting language a reading which is separated from the facts to which it is addressed. We decline to give the Supreme Court's statement a binding effect that there is no reason to believe the Court intended. *See United States v. Ordonez*, 737 F.2d 793, 803 n. 1 (9th Cir.1984) (discussing uses of dictum).

The Supreme Court's interpretation of section 33(g) in *Cowart* served the purposes of that subsection to " 'protect[ ] the employer against his employee's accepting too little for his cause of action against a third party.' " *Cowart*, ___ U.S. at ___, 112 S.Ct. at 2598 (quoting *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 467, 88 S.Ct. 1140, 1145, 20 L.Ed.2d 30 (1968)). The construction urged by the Cretans, if applied to section 33(g), would defeat that purpose. If applied to section 33(f), the same construction would defeat the purpose of that subsection to protect the employer against double recovery. In light of the purposes of section 33(f), there is little sense in a distinction that turns on whether the death for which settlement is made has yet to occur. That consideration leads us to adhere to our ruling in Force that claimants who settle before the death that gives rise to LHWCA benefits are subject to the section 33(f) set-off; the entitlement does not have to have become vested at the time the settlement is made. " 'The only relevant question is whether the claimant is impermissibly recovering twice for the same

injury, regardless of when such payments occur.' " Force, 938 F.2d at 984 (quoting Director's brief).

It is true that in Force, we deferred to the Director's interpretation of section 33(f), and that the Director now has changed positions and urges the same result as do the Cretans. For reasons already largely stated, we find the Director's new interpretation unreasonable. *See Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1136 (9th Cir.1988) (en banc) (substituting revised agency interpretation for an adverse precedent unnecessary if the substitution is unreasonable or inconsistent with the statute). If we were to adopt the Director's new view, relatives of claimants who are certain to die could negotiate settlements before the claimant's death and defeat the employer's offset. Furthermore, if the new view is extended to section 33(g), third-party tortfeasors could benefit from offering to desperate families inordinately small settlements the deficiencies of which the employer would have to make up. Those results would contradict the policy of employer protection that is evident on the face of sections 33(f) and (g). *See Cowart*, ___ U.S. at ___, 112 S.Ct. at 2598.

On one point, we do agree with the Cretans and the Director regarding the effect of *Cowart*. The term "person entitled to compensation" must receive the same construction in sections 33(f) and 33(g), in accord with "the basic canon of statutory construction that identical terms within an Act bear the same meaning." *Cowart*, ___ U.S. at ___, 112 S.Ct. at 2596. Indeed, one of the reasons that the Supreme Court rejected the narrow interpretation of "entitled" urged by *Cowart* was that it made no sense

when applied equally to section 33(f). *Id.* Thus, in accordance with our ruling regarding section 33(f), we hold that the Cretans are persons "entitled to compensation" within the meaning of section 33(g). As we earlier explained, this holding, when combined with our ruling on section 33(f), defeats recovery for the Cretans under LHWCA: if their tort settlement was less than their statutory entitlement, they are barred by section 33(g); if the recovery exceeded their statutory entitlement, Bethlehem is entitled to set off its entire statutory liability under section 33(f).

CONCLUSION

Because Renate and Nicole Cretan were persons "entitled to compensation," they were subject to the provisions of sections 33(f) and (g) of the LHWCA when they settled their tort claims with third parties. Together, the two provisions act as a complete bar to recovery from Bethlehem. Accordingly, we need not consider the petitioners' and cross-petitioner's other arguments.

That portion of the Board's decision that allows Bethlehem a total set-off of its liabilities pursuant to section 33(f) is affirmed. That part of the Board's decision holding the Cretans not to be subject to section 33(g) is reversed. The matter is remanded to the Board.

AFFIRMED IN PART; REVERSED IN PART; REMANDED. Costs in favor of Bethlehem.

ESTATE OF FLOYD COWART, Petitioner

v

NICKLOS DRILLING COMPANY et al.

505 US ___, 120 L Ed 2d 379, 112 S Ct 2589

[No. 91-17]

Argued March 25, 1992. Decided June 22, 1992.

Decision: Forfeiture provision of Longshore and Harbor Workers' Compensation Act (33 USCS § 933(g)) held to apply where worker not then receiving or awarded compensation from employer settles third-party claim.

APPEARANCES OF COUNSEL

Lloyd N. Frischhertz argued the cause for petitioner.

Michael R. Dreeben argued the cause for federal respondent.

H. Lee Lewis, Jr. argued the cause for private respondents.

Justice **Kennedy** delivered the opinion of the Court.

The Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat. 1424, as amended, 33 USC § 901 et seq. [33 USCS §§ 901 et seq.], creates a comprehensive federal scheme to compensate workers injured or killed while employed upon the navigable waters of the United States. The Act allows injured workers, without forgoing compensation under the Act, to pursue claims against third parties for their injuries. But § 33(g) of the LHWCA, 33 USC § 933(g) [33 USCS § 933(g)], provides that under certain circumstances if a third-party claim is settled

without the written approval of the worker's employer, all future benefits including medical benefits are forfeited. The question we must decide today is whether the forfeiture provision applies to a worker whose employer, at the time the worker settles with a third party, is neither paying compensation to the worker nor is yet subject to an order to pay under the Act.

I

The injured worker in this case was Floyd Cowart, and his estate is now the petitioner. Cowart suffered an injury to his hand on July 20, 1983, while working on an oil drilling platform owned by Transco Exploration Company (Transco). The platform was located on the Outer Continental Shelf, an area subject to the Act. 43 USC § 1333(b) [43 USCS § 1333(b)]. Cowart was an employee of the Nicklos Drilling Company (Nicklos), who along with its insurer Compass Insurance Co. (Compass) are respondents before us. Nicklos and Compass paid Cowart temporary disability payments for 10 months following his injury. At that point Cowart's treating physician released him to return to work, though he found Cowart had a 40% permanent partial disability. App. 75. The Department of Labor notified Compass that Cowart was owed permanent disability payments in the total amount of $35,592.77, plus penalties and interest. This was an informal notice which did not constitute an award. No payments were made.

Cowart, meanwhile, had filed an action against Transco alleging that Transco's negligence caused his injury. On July 1, 1985, Cowart settled the action for

$45,000, of which he received $29,350.60 after attorney's fees and expenses. Nicklos funded the entire settlement under an indemnification agreement with Transco, and it had prior notice of the settlement amount. But Cowart made a mistake: he did not secure from Nicklos a formal, prior, written approval of the Transco settlement.

After settling, Cowart filed an administrative claim with the Department of Labor seeking disability payments from Nicklos. Nicklos denied liability on the grounds that under the terms of § 33(g)(2) of the LHWCA, Cowart had forfeited his benefits by failing to secure approval from Nicklos and Compass of his settlement with Transco, in the manner required by § 33(g)(1).

Section 33(g) provides in pertinent part:

"(g) Compromise obtained by person entitled to compensation

"(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

> "(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." 33 USC § 933(g) [33 USCS § 933(g)].

The Administrative Law Judge rejected Nicklos' argument on the basis of prior interpretations of § 33(g) by the Benefits Review Board (Board or BRB). In the first of those decisions, O'Leary v. Southeast Stevedoring Co., 7 BRBS 144 (1977), aff'd mem., 622 F2d 595 (CA9 1980), the Board held that in an earlier version of § 33(g) the words "person entitled to compensation" referred only to injured employees whose employers were making compensation payments, whether voluntary or pursuant to an award. The O'Leary decision held that a person not yet receiving benefits was not a "person entitled to compensation," even though the person had a valid claim for benefits.

The statute was amended to its present form, the form we have quoted, in 1984. In that year Congress redesignated then subsection (g) to what is now (g)(1) and modified its language somewhat, but did not change the phrase "person entitled to compensation." Congress also added the current subsection (g)(2), as well as other provisions. Following the 1984 amendments the Board decided Dorsey v. Cooper Stevedoring Co., 18 BRBS 25 (1986), app. dism'd 826 F2d 1011 (CA11 1987). The Board

reaffirmed its interpretation in O'Leary of the phrase "person entitled to compensation," saying that because the 1984 amendments had not changed the specific language, Congress was presumed to have adopted the Board's previous interpretation. It noted that nothing in the 1984 legislative history disclosed an intent to overrule the Board's interpretations. The Board decided that the forfeiture provisions of subsection (g)(2), including the final phrase providing that forfeiture occurs "regardless of whether the employer . . . has made payments or acknowledged entitlement to benefits," was a "separate provisio[n] applicable to separate situations." 18 BRBS, at 29.

The ALJ in this case held that under the reasoning of O'Leary and Dorsey, Cowart was not a person entitled to compensation because he was not receiving payments at the time of the Transco settlement. Thus, the written-approval provision did not apply and Cowart was entitled to benefits. Cowart's total disability award was for $35,592.77, less Cowart's net recovery from Transco of $29,350.60, for a net award of $6242.17. In addition, Cowart was awarded interest, attorney's fees, and future medical benefits, the last constituting, we think, a matter of great potential consequence. The Board affirmed in reliance on Dorsey. 23 BRBS 42 (1989) (per curiam).

On review, a panel of the Court of Appeals for the Fifth Circuit reversed. 907 F2d 1552 (1990). Without addressing the Board's specific statutory interpretation, it held that § 33(g) contains no exceptions to its written-approval requirement. Because this holding, and a decision by a panel in a different case, Petroleum Helicopters, Inc. v. Barger, 910 F2d 276 (CA5 1990), conflicted with a

previous unpublished decision in the same Circuit, Kahny v. O.W.C.P., 729 F2d 777 (CA5 1984), the Court of Appeals granted rehearing en banc. The Director of the Office of Workers' Compensation Programs (OWCP), a part of the Department of Labor, 20 CFR § 701.201 (1991), appeared as a respondent before the full Court of Appeals to defend the interpretation and decision of the Board.

In a per curiam opinion, the en banc Court of Appeals confirmed the panel's decision reversing the BRB in its Cowart case. 927 F2d 828 (CA5 1991). The Court of Appeals' majority held that § 33(g) is unambiguous in providing for forfeiture whenever an LHWCA claimant fails to get written approval from his employer of a third-party settlement. The majority acknowledged the well-established principle requiring judicial deference to reasonable interpretations by an agency of the statute it administers, but concluded that the plain language of § 33(g) leaves no room for interpretation. Judge Politz, joined by Judges King and Johnson, dissented on the ground that the OWCP's was a reasonable agency interpretation of the phrase "person entitled to compensation," to which the Court of Appeals should have deferred.

We granted certiorari because of the large number of LHWCA claimants who might be affected by the Court of Appeals' decision. 502 U.S. ___, 116 L Ed 2d 653, 112 S Ct 635, 116 L Ed 2d 653 (1991). We now affirm.

II

In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished. Demarest v. Manspeaker, 498 U.S. ___, ___, 112 L Ed 2d 608, 111 S Ct 599 (1991). The question is whether Cowart, at the time of the Transco settlement, was a "person entitled to compensation" under the terms of § 33(g)(1) of the LHWCA. Cowart concedes that he did not comply with the written-approval requirements of the statute, while Nicklos and Compass do not claim that they lacked notice of the Transco settlement. By the terms of § 33(g)(2), Cowart would have forfeited his LHWCA benefits if, and only if, he was subject to the written-approval provisions of § 33(g)(1). Cowart claims that he is not subject to the approval requirement because in his view the phrase "person entitled to compensation," as long interpreted by both the BRB and the OWCP, limits the reach of § 33(g)(1) to injured workers who are either already receiving compensation payments from their employer, or in whose favor an award of compensation has been entered. Nicklos and Compass, supported by the United States, defend the holding of the Court of Appeals that § 33(g) cannot support that reading. We agree with these respondents and hold that under the plain language of § 33(g), Cowart forfeited his right to further LHWCA benefits by failing to obtain the written approval of Nicklos and Compass prior to settling with Transco.

The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the

clear meaning of statutes as written. The principle can at times come into some tension with another fundamental principle of our law, one requiring judicial deference to a reasonable statutory interpretation by an administering agency. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L Ed 2d 694, 104 S Ct 2778 (1984); National R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. ___, ___, 118 L Ed 2d 52, 112 S Ct 1394 (1992). Of course, a reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms. K mart Corp. v. Cartier, Inc., 486 U.S. 281, 291, 100 L Ed 2d 313, 108 S Ct 1811 (1988); Chevron, supra, at 842-843, 81 L Ed 2d 694, 104 S Ct 2778. In any event, we need not resolve any tension of that sort here, because the Director of the OWCP and the Department of Labor have altered their position regarding the best interpretation of § 33(g). The Director appears as a respondent before us, arguing in favor of the Court of Appeals' statutory interpretation, and contrary to his previous position. See Brief for Federal Respondent 8, n. 6. If the Director asked us to defer to his *new* statutory interpretation, this case might present a difficult question regarding whether and under what circumstances deference is due to an interpretation formulated during litigation. See Bowen v. Georgetown University Hospital, 488 U.S. 204, 212-213, 102 L Ed 2d 493, 109 S Ct 468 (1988); Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. ___, ___, 113 L Ed 2d 117, 111 S Ct 1171 (1991). The agency does not ask this, however. Instead, the federal respondent argues that the Court of Appeals was correct in saying the language § 33(g) is plain and cannot support the interpretation

given it by the Board. Because we agree with the federal respondent and the Court of Appeals, and because Cowart concedes that the position of the BRB is not entitled to any special deference, see Brief for Petitioner 25; see also Potomac Electric Power Co. v. Director, Office of Worker's Compensation Programs, 449 U.S. 268, 278, n. 18, 66 L Ed 2d 446, 101 S Ct 509 (1980); Martin v. Occupational Safety and Health Review Comm'n, supra, we need not resolve the difficult issues regarding deference which would be lurking in other circumstances.

As a preliminary matter, the natural reading of the statute supports the Court of Appeals' conclusion that a person entitled to compensation need not be receiving compensation or have had an adjudication in his favor. Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the person satisfies the prerequisites attached to the right. See generally Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 33 L Ed 2d 548, 92 S Ct 2701 (1972) (discussing property interests protected by the Due Process Clause and contrasting an entitlement to an expectancy); Black's Law Dictionary 532 (6th ed. 1990) (defining "entitle" as "To qualify for; to furnish with proper grounds for seeking or claiming"). Cowart suffered an injury which by the terms of the LHWCA gave him a right to compensation from his employer. He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen.

If the language of § 33(g)(1), in isolation, left any doubt, the structure of the statute would remove all ambiguity. First, and perhaps most important, when Congress amended § 33(g) in 1984, it added the explicit forfeiture features of § 33(g)(2), which specify that forfeiture occurs "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." We read that phrase to modify the entirety of subsection (g)(2), including the beginning part discussing the written-approval requirement of paragraph (1). The BRB did not find this amendment controlling because the quoted language is not an explicit modification of subsection (1). This is a strained reading of what Congress intended. Subsection (g)(2) leaves little doubt that the contemplated forfeiture will occur whether or not the employer has made payments or acknowledged liability.

The addition of subsection (g)(2) in 1984 also precludes the primary argument made by the BRB in favor of its decisions in Dorsey and this case, and repeated by Cowart to us: That Congress in 1984, by reenacting the phrase "person entitled to compensation," adopted the Board's reading of that language in O'Leary. The argument might have had some force if § 33(g) had been reenacted without changes, but that was not the case. In 1984 Congress did more than reenact § 33(g); it added new provisions and new language which on their face appear to have the specific purpose of overruling the prior administrative interpretation. In light of the clear import of § 33(g)(2), the Board erred in relying on the purported lack of legislative history showing an explicit

intent to reject the O'Leary decision. Even were it relevant, the Board's reading of the legislative history is suspect because as the federal respondent demonstrates, the legislative history of predecessor bills to the eventual 1984 enactment do indicate an intent to overturn O'Leary. See Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 97th Cong., 1st Sess. 209, 210-211, 396 (1981). In any event, administrative interpretation followed by congressional reenactment cannot overcome the plain language of a statute. Demarest v. Manspeaker, 498 U.S., at ___, 112 L Ed 2d 608, 111 S Ct 599. And the language of § 33(g) is plain.

Our interpretation of § 33(g) is reinforced by the fact that the phrase "person entitled to compensation" appears elsewhere in the statute in contexts in which it cannot bear the meaning placed on it by Cowart. For example, § 14(h) of the LHWCA, 33 USC § 914(h) [33 USCS § 914(h)], requires an official to conduct an investigation upon the request of a person entitled to compensation when, inter alia, the claim is controverted and payments are not being made. For that provision, the interpretation championed bv Cowart would be nonsensical. Another difficulty would be presented for the provision preceding § 33(g), § 33(f). It mandates that an employer's liability be reduced by the net amount a person entitled to compensation recovers from a third party. Under Cowart's reading, the reduction would not be available to employers who had not yet begun payment at the time of the third-party recovery. That result makes no sense under the LHWCA structure. Indeed,

when a litigant before the BRB made this argument, the Board rejected it, acknowledging in so doing that it had adopted differing interpretations of the identical language in sections 33(f) and 33(g). Force v. Kaiser Aluminum and Chemical Corp., 23 BRBS 1, 4-5 (1989). This result is contrary to the basic canon of statutory construction that identical terms within an Act bear the same meaning. Sullivan v. Stroop, 496 U.S. 478, 484, 110 L Ed 2d 438, 110 S Ct 2499 (1990); Sorenson v. Secretary of Treasury, 475 U.S. 851, 860, 89 L Ed 2d 855, 106 S Ct 1600 (1986). The Board's willingness to adopt such a forced and unconventional approach does not convince us we should do the same. And we owe no deference to the BRB, see supra, at ___, 120 L Ed 2d at ___.

Yet another reason why we are not convinced by the Board's position is that the Board's interpretation of "person entitled to compensation" has not been altogether consistent; and Cowart's interpretation may not be the same as the Board's in precise respects. At times the Board has said this language refers to an employee whose "employer is actually paying compensation either pursuant to an award or voluntarily when claimant enters into a third party settlement." Dorsey, 18 BRBS, at 28; 23 BRBS, at 44 (case below). At other times, sometimes within the same opinion, the Board has spoken in terms of the employer either making payments or acknowledging liability. O'Leary, 7 BRBS, at 147-149; Dorsey, 18 BRBS, at 29; see also In re Wilson, 17 BRBS 471, 480 (ALJ 1985). Cowart, on the other hand, would include within the phrase both employees receiving compensation benefits and employees who have a judicial award of compensation but are not receiving benefits. Brief for Petitioner 6.

This distinction is an important part of Cowart's response to the position of the United States. Reply Brief for Petitioner 8. It may be that the gap between the Board's and Cowart's positions can be explained by the Board's inconsistency; but that in itself weakens any argument that the Board's interpretation is entitled to some weight.

We do not believe that Congress' use of the word "employee" in subsection (g)(2), rather than the phrase "person entitled to compensation," undercuts our reading of the statute. The plain meaning of subsection (g)(1) cannot be altered by the use of a somewhat different term in another part of the statute. Subsection (g)(2) does not purport to speak to the question of who is required under subsection (g)(1) to obtain prior written approval.

Cowart's strongest argument to the Court of Appeals was that any ambiguity in the statute favors him because of the deference due the OWCP Director's statutory construction, a deference which Nicklos and Compass concede is appropriate. Brief for Respondents 7. As we have said, we are not faced with this difficult issue because the views of the Director, OWCP, have changed since we granted certiorari. Supra, at ___, 120 L Ed 2d at ___. It seems apparent to us that it would be quite inappropriate to defer to an interpretation which has been abandoned by the policymaking agency itself. It is noteworthy, moreover, that even prior to this case the position of the Department of Labor has not been altogether consistent. It is true that the Director has twice, albeit in a somewhat equivocal manner, endorsed the Board's rulings in O'Leary and Dorsey. First, in a 1986 circular discussing the Board's Dorsey case a subordinate of the Director stated: "While the Board's position may not be totally

consistent with the amended language of Section 33(g), we think it is a rational approach and have advised the Associate Solicitor that we will support this position." United States Dept. of Labor, LHWCA Circular No. 86-3, p. 1 (May 30, 1986). Next, in a Manual published in 1989 the Director again adopted the Board's position that written approval of a settlement is required only from employers who are paying compensation; but the statement ends with a qualifying comment, that "[t]he issue of consent to a settlement can be a complex matter. Judicial interpretation may be necessary to resolve the issue. (See LHWCA CIRCULAR 86-03, 5-30-86)." United States Dept. of Labor, Longshore and Harbor Workers' Compensation Act (LHWCA) Procedure Manual, ch. 3-600, ¶ 9 (Sept. 1989). On the other hand, the Department of Labor has issued regulations (effective in their current form since 1986) which are explicit that the written-approval requirement of § 33(g) applies to a settlement for less than the amount of compensation due under the LHWCA, "regardless of whether the employer or carrier has made payments of [sic] acknowledged entitlement to benefits under the Act." 20 CFR § 702.281(b) (1991). So the Department of Labor has not been speaking with one voice on this issue. This further diminishes the persuasive power of the Director's earlier decision to endorse the BRB's questionable interpretation, a decision he has since reconsidered.

The history of the Department of Labor regulation goes far toward confirming our view of the significance of the 1984 amendments. The original § 702.281, proposed in 1976 and enacted in final form in 1977, required only

that an employee notify his employer and the Department of any third-party claim, settlement, or judgment. 41 Fed.Reg. 34297 (1976); 42 Fed.Reg. 45303 (1977). The sole reference to the forfeiture provisions was a closing parenthetical: "Caution: See 33 USC § 933(g) [33 USCS § 933(g)]." In 1985, in response to the 1984 congressional amendments, the Department proposed to amend § 702.281 by replacing the closing parenthetical with a subsection (b), stating that failure to obtain written approval of settlements for amounts less than the compensation due under the Act would lead to forfeiture of future benefits. 50 Fed.Reg. 400 (1985). In response to comments, the final rulemaking modified § 702.281(b) to clarify that the forfeiture provision applied regardless of whether the employer was paying compensation. 51 Fed.Reg. 4284-4285 (1986). Thus the evolution of § 702.281 suggests that at least some elements within the Department of Labor read the 1984 statutory amendments to adopt a rule different from the Board's previous decisions.

We also reject Cowart's argument that our interpretation of § 33(g) leaves the notification requirements of § 33(g)(2) without meaning. An employee is required to provide notification to his employer, but is not required to obtain written approval, in two instances: (1) Where the employee obtains a judgment, rather than a settlement, against a third party; and (2) Where the employee settles for an amount greater than or equal to the employer's total liability. Under our construction the written approval requirement of § 33(g)(1) is inapplicable in those instances, but the notification requirement of § 33(g)(2) remains in force. That is why subsection (g)(2)

mandates that an employer be notified of "any settlement."

This view comports with the purposes and structure of § 33. Section 33(f) provides that the net amount of damages recovered from any third party for the injuries sustained reduces the compensation owed by the employer. So the employer is a real party in interest with respect to any settlement that might reduce but not extinguish the employer's liability. The written-approval requirement of § 33(g) "protects the employer against his employee's accepting too little for his cause of action against a third party." Banks v. Chicago Grain Trimmers, 390 U.S. 459, 467, 20 L Ed 2d 30, 88 S Ct 1140 (1968). In cases where a judgment is entered, however, the employee does not determine the amount of his recovery, and employer approval, even if somehow feasible, would serve no purpose. And in cases where the employee settles for greater than the employer's liability, the employer is protected regardless of the precise amount of the settlement because his liability for compensation is wiped out. Notification provides full protection to the employer in these situations because it ensures against fraudulent double recovery by the employee.

As a final line of defense, Cowart's attorney suggested at oral argument that Nicklos' participation in the Transco settlement brought this case outside the terms of § 33(g)(1). Tr. of Oral Arg. 4-7. Relying on the recent decision of the Court of Appeals for the Fourth Circuit in I.T.O. Corporation of Baltimore v. Sellman, 954 F2d 239, 242-243 (1992), counsel argued that § 33(g)(1) requires

written approval only of "settlement[s] with a third person," and that Nicklos' participation in the Transco settlement meant it was not with a *third person*. Without indicating any view on the merits of this contention, we do not address it because it is not fairly included within the question on which certiorari was granted. See this Court's Rule 14.1(a).

We need not today decide the retroactive effect of our decision, nor the relevance of res judicata principles for other LHWCA beneficiaries who may be affected by our decision. Compare Pittston Coal Group v. Sebben, 488 U.S. 105, 121-123, 102 L Ed 2d 408, 109 S Ct 414 (1988). We do recognize the stark and troubling possibility that significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute, and that its forfeiture penalty creates a trap for the unwary. It also provides a powerful tool to employers who resist liability under the Act. Counsel for respondents stated during oral argument that he had used the Transco settlement as a means of avoiding Nicklos' liability under the LHWCA. Tr. of Oral Arg. 23-26. These harsh effects of § 33(g) may be exacerbated by the inconsistent course followed over the years by the federal agencies charged with enforcing the Act. But Congress has spoken with great clarity to the precise question raised by this case. It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts.

For the reasons stated, the judgment of the Court of Appeals is Affirmed.

SEPARATE OPINION

Justice **Blackmun**, with whom Justice **Stevens** and Justice **O'Connor** join, dissenting.

For more than 14 years, the Director of the Office of Workers' Compensation Programs interpreted the Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 USC § 901 et seq. [33 USCS §§ 901 et seq.] (LHWCA or the Act), in the very same way that petitioner Floyd Cowart's estate now urges. Indeed, the Director *advocated* Cowart's position in the Court of Appeals, both before the panel and before that court en banc.

After certiorari was granted, however, and after Cowart's opening brief was filed, the United States informed this Court: "In light of the en banc decision in this case, the Department of Labor reexamined its views on the issue." Brief for Federal Respondent 8, n. 6. The United States now assures us that the interpretation the Director advanced and defended for 14 years is inconsistent with the statute's "plain meaning." The Court today accepts that improbable contention, and in so doing rules that perhaps thousands of employees and their families must be denied death and disability benefits. I cannot agree with the Government's newly discovered interpretation, and still less do I find it to be compelled by the "plain meaning" of the statute. The Court needlessly inflicts additional injury upon these workers and their families. I dissent.

I

Ever since the LHWCA was adopted in 1927, it has included some version of the present § 33(g), 33 USC § 933(g) [33 USCS § 933(g)], the provision at issue in this case. Because that provision cannot be considered in isolation from the broader context of § 33, or indeed, the LHWCA as a whole, some background on the structure of the Act and the history of § 33's interpretation is essential.

A

The LHWCA requires employers to provide compensation, "irrespective of fault," for injuries and deaths arising out of covered workers' employment. §§ 3(a) and 4(b), 33 USC §§ 903(a) and 904(b) [33 USCS §§ 903(a) and 904(b)]. In return for requiring the employer to pay statutory compensation without proof of negligence, the Act grants the employer immunity from tort liability, regardless of how serious its fault may have been. See §§ 5(a) and 33(i). Benefits under the LHWCA are strictly limited, generally to medical expenses and two-thirds of lost earnings, and are set out in detailed schedules contained in the Act itself. See §§ 7-9. A fundamental assumption of the Act is that employers liable for benefits will pay compensation "promptly," "directly," and "without an award" having to be issued. See § 14(a).

In a case where a third party may be liable, the LHWCA does not require a claimant to elect between statutory compensation and tort recovery. § 33(a). Where a claimant has accepted compensation under a formal award, then, within a specified time, he may file a civil

action against the third party. § 33(b). If a claimant recovers in that action, his compensation under the LHWCA is limited to the excess, if any, of his statutory compensation over the net amount of his recovery. § 33(f). Section 33(f) thus operates as a set-off provision, allowing an employer to reduce its LHWCA liability by the net amount a claimant obtains from a third party. Where the claimant nets as much or more from the third party as he would have received from his employer under the LHWCA, the employer owes him no benefits.

Section 33(g) of the LHWCA, 33 USC § 933(g) [33 USCS § 933(g)], addresses the situation in which a claimant-plaintiff settles an action against a third party for *less* than he would have received under the Act. Under § 33(f), considered alone, the claimant in this situation would always be able to collect the remainder of his statutory benefits from the employer. To protect the employer from having to pay excessive § 33(f) compensation because of an employee's "lowball" settlement, § 33(g) conditions LHWCA compensation, in specified circumstances, upon the employer's written approval of the third-party settlement. See Banks v Chicago Grain Trimmers, 390 U.S. 459, 467, 20 L Ed 2d 30, 88 S Ct 1140 (1968).

Before the LHWCA's 1984 amendments, § 33(g) provided that if a "person entitled to compensation" settled for less than the compensation to which he was entitled under the Act, then the employer would be liable for compensation, as determined in § 33(f), only if the person obtained and duly filed with the Department of Labor the employer's written approval of the settlement. The meaning of the term "person entitled to compensation" has

proved to be a difficult issue, both in the pre-1984 version of the Act and – as this case demonstrates – in the Act's current form.

B

This issue apparently was considered first in O'Leary v Southeast Stevedoring Co., 7 Ben Rev Bd Serv 144 (1977), aff'd, 622 F 2d 595 (CA9 1980). In that case, the employer denied liability for the death of the claimant's husband, contending that the decedent was not an employee covered by the LHWCA and that the injury did not arise out of his employment. 7 Ben Rev Bd Serv, at 145. The employer persisted in denying liability even after its position was rejected by the Benefits Review Board ("BRB").[1] See id., at 146-147. Eventually, more than 28 months after her husband's accident, the claimant settled a third-party suit for $37,500. About one month thereafter, an Administrative Law Judge (ALJ), on remand from the BRB, entered an award for the claimant. The value of the death benefits awarded, assuming that the claimant would live out her normal life expectancy without remarrying, amounted to more than $150,000. See O'Leary v Southeast Stevedoring Co., 5 Ben Rev Bd Serv 16 (ALJ) and 20 (ALJ) (1976). At that point, the employer contested liability for any compensation on the ground that, under § 33(g), the claimant had forfeited

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[1] The BRB consists of persons appointed by the Secretary of Labor and empowered to "hear and determine appeals raising a substantial question of law or fact" with respect to LHWCA benefits claims. § 21(b)(3), 33 USC § 921(b)(3) [33 USCS § 921(b)(3)].

that compensation by failing to obtain the employer's written approval of the settlement.

The ALJ rejected the employer's position, reasoning that the claimant was not a "person entitled to compensation" at the time of the settlement. The BRB affirmed. The Board pointed out that the "underlying concept" of the LHWCA is that "the employer upon being informed of an injury will voluntarily begin to pay compensation." O'Leary, 7 Ben Rev Bd Serv, at 147 (citing § 14(a)). Further, the Board observed, § 33(g) refers to the conditions under which an employer will be "liable" for compensation under § 33(f); the reference to "liability," the Board reasoned, "contemplat[es] that the employer either be making voluntary payments under the Act or that it ha[s] been found liable for benefits by a judicial determination." Id., at 148. Moreover, the Board continued, § 33(b) gives the employer the right to pursue third parties only if the employer is paying compensation under an award. Thus, the premise of employer rights under § 33, the Board concluded, is that the employer is "making either voluntary payments under the Act or pursuant to an award." Ibid.

The BRB observed that the employer in O'Leary had not paid compensation either voluntarily or pursuant to an award, but, instead, consistently had denied liability. It could hardly have been clear to the claimant at the time she settled her third-party suit that the BRB would ultimately decide in her favor. Indeed, only after that settlement and after the ALJ award did the employer concede that the claimant represented a "person entitled to compensation," and then only to argue that, for that reason, she had forfeited her right to compensation under § 33(g).

The Board emphasized that the employer's interpretation would place claimants in a severe bind:

> "If a claimant was injured through the negligence of a third party and the employer denied coverage under the Act, a claimant would be forced to sue the third party. However, even if the claimant obtained a reasonable settlement offer, an employer could refuse to give its consent to the third party settlement for any number of reasons, e.g., it does not wish to approve the settlement on a form provided under the Act since its consent to jurisdiction under the Act might be inferred. This could result in a claimant not being paid any compensation, yet the claimant would be afraid to make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money. . . . " Id., at 149.

And under the employer's interpretation of § 33(g), the employee would thereby forfeit all right to compensation under the Act. Surely, the Board concluded, "Congress by requiring written consent could not have contemplated such a result." Ibid.

The Court of Appeals for the Ninth Circuit affirmed in an unpublished opinion, App 113, stating: "The Board's ruling is reasonable and furthers the underlying purpose of the Act." Id., at 117. The Court of Appeals for the Fifth Circuit, in an unpublished opinion, upheld a similar BRB decision in 1984, finding the O'Leary approach "fully consistent with the language, legislative history, and rationale of" § 33(g). See Kahny v OWCP, 729

F 2d 777 (table) and App 96, 108. No other courts had occasion to examine the O'Leary interpretation before the LHWCA was next amended.

C

The Longshore and Harbor Workers' Compensation Act Amendments of 1984, 98 Stat 1639, revisited § 33(g). Id., at 1652. The former § 33(g) was carried over, with minor changes not relevant here, as § 33(g)(1), and a new subsection (g)(2) was added. Section 33(g) now reads as follows:

> "(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
>
> "(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act."

In Dorsey v Cooper Stevedoring Co., 18 Ben Rev Bd Serv 25 (1986), appeal dism'd sub nom Cooper Stevedoring Co. v Director, 826 F 2d 1011 (CA11 1987), the Board rejected an employer's argument that the final clause of the new § 33(g)(2) should be understood as overturning the O'Leary rule that no duty to obtain approval arises until the employer begins to pay compensation. Subsection (g)(1), the Board stated, reenacted the prior version of § 33(g) as it was interpreted in O'Leary; the new subsection, (g)(2), was intended to apply to situations not covered by (g)(1) or O'Leary. In these situations – where the employer has neither paid compensation nor acknowledged liability – notice, but not written approval, is required. 18 Ben Rev Bd Serv, at 29-30. The Board interpreted the final clause of (g)(2) – language that echoes the Board's words in O'Leary – to make clear that the notification requirement, described in (g)(2), was not subject to the O'Leary limitation that is incorporated in (g)(1). Id., at 29.

This interpretation is reinforced, the Board continued, by two other considerations. First, although in a number of instances the 1984 legislative history indicates a congressional intention to override other BRB and judicial decisions, that history "indicates no congressional intent to overrule O'Leary." Id., at 30. Second, the Board observed, this Court has held that the LHWCA "should be construed in order to further its purpose of compensating longshoremen and harbor workers 'and in a way

which avoids harsh and incongruous results.' " Id., at 31, quoting Voris v Eikel, 346 U.S. 328, 333, 98 L Ed 5, 74 S Ct 88 (1953), and citing Northeast Marine Terminal Co. v Caputo, 432 U.S. 249, 268, 53 L Ed 2d 320, 97 S Ct 2348 (1977). As O'Leary made clear, allowing employers to escape all LHWCA liability by withholding approval from any settlement, while refusing to pay benefits or acknowledge liability, could hardly be thought consistent with the purpose of encouraging prompt, voluntary payment of LHWCA compensation.

D

Such was the legal background against which Cowart's claim was considered. In the administrative proceedings, the BRB relied on O'Leary and Dorsey to reject the argument, offered by respondent Nicklos Drilling Company, that by failing to obtain prior written approval of his third-party settlement Cowart had forfeited his LHWCA benefits. Because Nicklos was not paying Cowart benefits, either voluntarily or under an award, the Board reasoned, Cowart was not a "person entitled to compensation" within the meaning of § 33(g)(1), and he therefore was not required to obtain Nicklos' approval of his settlement. 23 Ben Rev Bd Serv 42, 46 (1989). Instead, the Board held, Cowart was required only to give Nicklos notice of the settlement, as provided in § 33(g)(2). Because Nicklos indisputably had notice of the settlement – indeed, it had notice three months before the settlement was consummated – the Board ruled Cowart was eligible for LHWCA benefits.

On Nicklos' petition for review, the Director of the Office of Workers' Compensation Programs ("OWCP") – head of the agency charged with administering the Act – defended the Board's interpretation before the Court of Appeals for the Fifth Circuit. First a panel of the Court of Appeals, and then the full court, by a divided vote sitting en banc, however, rejected the Director's position, ruling that Cowart was a "person entitled to compensation" and was required by § 33(g)(1) to obtain Nicklos' written approval. See 907 F 2d 1552 (1990) (panel), and 927 F 2d 828 (1991) (en banc). We are told that after this Court granted certiorari, and after Cowart filed his opening brief, the Director "reexamined" his position and argued that the interpretation of § 33(g) he had maintained for 14 years, and defended in the Court of Appeals, was inconsistent with the Act's plain meaning.

II

This Court today agrees with the Director's post-certiorari position that Cowart's claim for compensation is barred by the "clear meaning" of the statute "as written." Ante, at ___, 120 L Ed 2d, at 389. According to the Court, Cowart is plainly a "person entitled to compensation" within the meaning of § 33(g)(1), and his failure to obtain Nicklos' written approval of his third-party settlement requires, by the "plain language" of § 33(g), that he be deemed to have forfeited his statutory benefits. Although the Court does not identify any plausible statutory purpose whatsoever advanced by its reading, and although – to its credit – it acknowledges the "harsh effects" of its interpretation, ante, ___, at 120 L Ed 2d, at

394, the Court ultimately concludes that the language of § 33 compels it to reject Cowart's position.

In my view, the language of § 33 in no way compels the Court to deny Cowart's claim. In fact, the Court's reliance on the Act's "plain language," ante, at ___, 120 L Ed 2d at 389, is selective: as discussed below, analysis of §§ 33(b) and (f) of the Act shows that, even leaving aside the question whether Cowart is a "person entitled to compensation," a *consistently* literal interpretation of the Act's language would not require Cowart to have obtained Nicklos' written approval of the settlement. Indeed, under a thoroughgoing "plain meaning" approach, Cowart would be entitled to receive *full* LHWCA benefits in addition to his third-party settlement, not just the excess of his statutory benefits over the settlement.

At the same time, a consistently literal interpretation of the Act would commit the Court to positions it might be unwilling to take. The conclusion I draw is not that the Court should adopt a purely literal interpretation of the Act, but instead that the Court should recognize, as it has until today, that the LHWCA must be read in light of the purposes and policies it would serve. Once that point is recognized, then, as suggested by the Court's closing remarks on the "stark and troubling" implications of its interpretation, ante, at ___, 120 L Ed 2d at 394, it follows that recognition of Cowart's claim is fully consistent with the Act.

A

Were the Court truly to interpret the Act "as written," it would not conclude that Cowart is barred from receiving compensation. Section 33(g)(1) of the LHWCA, on which the Court's "plain meaning" argument relies, provides that if a "person entitled to compensation" settles with a third party for an amount less than his statutory benefits, his employer will be "liable for compensation *as determined under subsection (f)*" only if the "person entitled to compensation" obtains and files the employer's written approval. The "plain language" of subsection (g)(1) does not establish any general written approval requirement binding either all "persons entitled to compensation," or the subset of those persons who settle for less than their statutory benefits. Instead, it requires written approval only as a condition of receiving compensation "as determined under subsection (f)." Where the "person entitled to compensation" is not eligible for compensation "as determined under subsection (f)," subsection (g)(1) does not require him to obtain written approval.

The "plain language" of subsection (f) in turn suggests that the provision does not apply to Cowart's situation. Subsection (f), by its terms, applies only "[i]f the person entitled to compensation institutes proceedings within the period prescribed in subsection (b)." And the "period prescribed in subsection (b)" begins, by the terms of that subsection, upon the person's "[a]cceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board." Cowart's third-party suit was clearly *not* instituted within this period: he filed suit

before any award of LHWCA benefits, and he still has not accepted (or been offered) compensation under any award. Thus, he does not come within the "plain meaning" of subsection (f), and, accordingly, for the reasons given above, he would not be bound by the subsection (g)(1) written-approval requirement. It would also follow that, because Nicklos indisputably received the notice required by subsection (g)(2), that provision would not bar Cowart from receiving LHWCA compensation and medical benefits.

Indeed, if Cowart is not covered by subsection (f), he would appear to have been eligible for a larger award than he sought. Subsection (f) does not authorize compensation otherwise unavailable; instead, it operates as a *limit*, in the specified circumstances, on the employer's LHWCA liability. If read literally, subsection (f) would not bar Cowart from receiving full LHWCA benefits, *in addition to* the amount he received in settlement of the third-party claim.

It is true that § 33(f) has not always been read literally. Subsection (f) has been assumed to be applicable where, for example, the claimant's third-party suit was filed after an employer *voluntarily* began paying LHWCA compensation, not just where compensation was paid pursuant to an award. See, e.g., I.T.O. Corp. of Baltimore v Sellman, 954 F 2d 239, 240, 243-245 (CA4 1992); Shellman v United States Lines, Inc., 528 F 2d 675, 678-679, n. 2 (CA9 1975), cert. denied, 425 U.S. 936, 48 L Ed 2d 177, 96 S Ct 1668 (1976) (referring to the availability of an employer's lien, where the employer has paid compensation without an award, as "judicially created" rather than statutory). That interpretation is

eminently sensible and consistent with the statutory purpose of encouraging employers to make payments "promptly," "directly," and "without an award." See § 14(a). A contrary interpretation would penalize employers who acknowledge liability and commence payments without seeking an award, and it would reward employers who, whether in good faith or bad, contest their liability until faced with a formal award. See Shellman, 528 F 2d, at 679, n. 2 ("The purpose of this Act would be frustrated if a different result could be reached merely because the employer pays compensation without entry of a formal award.").

It is not obvious, however, that a similar argument from statutory purpose should be available to employers such as Nicklos who refuse to pay benefits and then seek shelter under § 33(f) (and by extension, § 33(g)(1)). And the fact remains that the Court professes to interpret the "clear meaning" of the statute "as written." The Court's interpretation today, however, is no more compelled by the language of the LHWCA than the interpretation Cowart defends: the Court is simply insensible to the fact that it implicitly has relied upon presumed statutory purposes and policy considerations to bring Nicklos and Cowart under the setoff provisions of § 33(f), thus absolving Nicklos of the first $29,000 in LHWCA liability. Only at *that* point does the Court invoke the plain meaning rule and insist on a "literal" interpretation of § 33(g)(1). This selective insistence on "plain meaning" deprives Cowart's estate of the last $6,242.77 Nicklos would otherwise have been bound to pay.

B

For these reasons, I think it clear that a purely textual approach to the LHWCA cannot justify the Court's holding. In my view, a more sensible approach is to consider § 33(g) as courts always have considered the other parts of § 33 – in relation to the history, structure, and policies of the Act.

1

Looking first to § 33's history, for present purposes the most relevant aspect is the 1984 amendment to § 33(g) through which that provision assumed its present form. The amended provision clearly bears the impress of the Board's O'Leary decision. The reference in § 33(g)(2) to that subsection's applicability, "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits," tracks the limitation recognized in O'Leary – a limitation that had been unanimously approved by panels of two Federal Courts of Appeals. The question, then, is whether Congress sought to incorporate that holding or to repudiate it in the 1984 amendments to § 33(g).

The critical fact in this inquiry is Congress' use of the term "employee," rather than "person entitled to compensation," in connection with the notification requirement. The use of this term is in marked contrast to the other clauses of § 33(g). Section 33(g)(1) conditions § 33(f) compensation of a settling "person entitled to compensation" on securing the employer's written approval, and

§ 33(g)(2) provides, somewhat redundantly, that a "person entitled to compensation" forfeits all rights to compensation and medical benefits if the written approval mentioned in § 33(g)(1) is not obtained. The notification clause of § 33(g)(2), however, provides that "if the *employee* fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits . . . shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits" (emphasis added).

The use of the term "employee" in § 33(g)(2) strongly suggests that Congress intended to incorporate the BRB's holding in O'Leary. As mentioned, the language Congress chose for the last clause of § 33(g)(2) indicates that it was aware the Board had adopted a restrictive interpretation of the term "person entitled to compensation." Congress retained that term in connection with the written approval requirement of subsection (g)(1). Yet Congress chose the broad term, "employee," for the notification clause of subsection (g)(2), and "employee," unlike "person entitled to compensation," is a term expressly defined in the statute. See § 2(3).[2] The Court cannot explain why Congress would have chosen two different terms to apply to the different requirements. Indeed, on

[2] Subject to exceptions not applicable here, that section of the Act defines the term "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker."

the Court's interpretation, the two terms are identical in their extension. On the Court's reading, the term "person entitled to compensation" denotes only a statutory employee who has a claim that, aside from the requirements of § 33(g), would be recognized as valid. And that is exactly the denotation of the term "employee" in connection with the notification requirement. The fact that Congress chose to use different terms in connection with the different § 33(g) requirements – using, with respect to the written approval requirement, a term that it knew had been narrowly interpreted, and using, with respect to the notification requirement, a term broadly defined in the statute itself – surely indicates that Congress intended the two terms to have different meanings. Had Congress intended the meaning the Court attributes to it, it would have used the same term in both contexts.[3]

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[3] Two of the Court's other arguments concerning the 1984 amendments may deserve brief mention. First, the Court suggests in passing that "the legislative history of predecessor bills to the eventual 1984 enactment do indicate an intent to overturn O'Leary," citing snippets of written testimony submitted during the lengthy 1981 hearings. See ante, at ___ to ___ 120 L Ed 2d, at 390-391. Needless to say, statements buried in hearings conducted *three years before the bill's passage* fall far short of demonstrating any such congressional intent. The BRB was correct when it said in Dorsey that the legislative history of the 1984 amendments indicates no intention to overturn O'Leary. Second, the Court places great significance upon the fact that "at least some elements within the Department of Labor" read the post-1984 statute differently from the Director of OWCP. Ante, at ___, 120 L Ed 2d, at 393. The Court is quite clear, however, that it is the Director who administers the Act, see ante, at ___, 120 L Ed 2d, at 392, not these other "elements," and that the Director does not ask for deference to his recently adopted interpretation.

2

The inference that Congress intended to adopt the O'Leary rule in the amended language of § 33(g) is only strengthened by consideration of the factual context to which the provision was designed to apply. As the Board noted in O'Leary, and as the Director argued to the Court of Appeals, the Act presumes that employers, as a rule, will promptly recognize their LHWCA obligations and commence payments immediately, without the need for a formal award. See § 14(a). In that situation, the claimant generally knows the value of the benefits to be received, and can accurately compare that figure to any settlement offer. The claimant in this situation has no strong interest in the precise amount of any settlement that nets less than the statutory benefits, so long as the costs of suit are covered, because by operation of § 33(f), he would not be allowed to retain any of the proceeds. On the other hand, the employer who has acknowledged liability has a strong interest in recovering from the third party any benefits already paid to the claimant and in reducing or eliminating any future benefits it has committed itself to pay. For the employer in this situation, the precise amount of a settlement for less than the claimant's statutory benefits is vitally important: any net dollar the claimant recovers in a third-party action is a dollar less the employer will have to pay in LHWCA benefits.

Given the parties' different incentives in the situation where the employer already is paying benefits, it makes sense to require the claimant to protect the employer's interest, by requiring settlements to be reasonable in the employer's judgment. At the same time, giving the employer this power of approval does not generally

threaten the claimant's interests, since, as mentioned, only the employer has an interest in settlements above the threshold of the claimant-plaintiff's expenses and below the amount of promised or delivered LHWCA benefits.

Matters are quite different, however, when (as in the present case) the employer has refused to make statutory payments and is not subject to an enforceable award at the time of settlement. First, the claimant generally will not be able to estimate with certainty whether he will receive any LHWCA benefits, let alone how much. Accordingly, the calculation required by § 33(g) – a comparison between LHWCA benefits and settlement amount – will be far more difficult. Second, the claimant who is not receiving LHWCA payments, and who cannot be certain that he ever will receive payments, will have a much more powerful interest in negotiating a third-party settlement that is as favorable as possible. This claimant, unlike its counterpart who is receiving payments, therefore will have a strong incentive – independent of the § 33(g) requirements – to protect any interest the employer might have in reducing potential LHWCA liability. Finally, disabled longshore employees, or the families of a longshoreman killed on the job, are likely to be in a highly vulnerable position, subject to financial pressure that may lead them to overvalue a present lump-sum payment and undervalue future periodic payments that might eventually be available under an LHWCA award.

The employer who refuses to pay, by contrast, has taken the position that it owes no LHWCA benefits that may be reduced through a third-party settlement, and thus that it has no real interest in the amount for which

the third party settles. Moreover, as has been noted, the claimant who is not receiving benefits has a strong incentive to protect the employer's interest in reducing or eliminating any LHWCA liability that might eventually be imposed. Under the Court's interpretation of § 33(g)(1), however, such an employer in many cases can ensure that it will never be required to pay LHWCA benefits, even if it might otherwise ultimately be determined to be liable, simply by withholding approval of any settlement offer, regardless of amount. In practice, recalcitrant employers will seek to exempt themselves from statutory liability by withholding approval of settlements, hoping that their employees' need for present funds will force them to settle without approval. I cannot believe that Congress intended to require LHWCA claimants to bet their statutory benefits on the possibility that future administrative and perhaps judicial proceedings, years later, might vindicate their position that the employer should have been paying benefits – particularly when the employer's asserted interest is already adequately protected independently of § 33(g)(1).

3

The Court recognizes the patent unfairness of this situation, and it as much as admits that its interpretation is out of line with the policies of the Act. See ante, at ___, 120 L Ed 2d, at 394. Nevertheless, the Court holds that the plain meaning of the term "person entitled to compensation" clearly applies to both categories of claimants – those whose employers have denied liability, as well as those whose employers have acknowledged that they must pay statutory benefits. See ante, at ___-___, 120 L Ed

2d, at 390. For that reason, the Court implies, regardless of what Congress may have thought it was accomplishing in the 1984 amendments, the words "person entitled to compensation" simply will not bear the construction O'Leary gave them. See ante, at ___, 120 L Ed 2d, at 391.

Even setting aside my doubts, expressed above, about the plain meaning rule's application to this statute, I am not persuaded by the Court's contention. In my view, it does not strain ordinary language to describe claimants whose employers have acknowledged LHWCA liability as "persons entitled to compensation," but to withhold that description from claimants whose employers have denied liability for compensation. This is particularly so, given the context in which the term appears in the statute. Section 33(g)(1) requires the "person entitled to compensation" to compare two figures – the amount of a settlement offer, on the one hand, and the amount of compensation to which the person is entitled, on the other. But what is that latter figure in a situation in which the employer denies liability in full or in part? Doubtless, the claimant could hazard a guess by consulting the Act's jurisdictional provisions concerning who is covered for which kind of accident, the compensation schedules included in the Act, and, in the case of a disability claim, the opinion of the claimant's doctor that the claimant in fact is disabled. The very nature of the situation, however, is that it is not clear that such a person is indeed "entitled to compensation" – that question, after all, is exactly the issue that the employer's position requires to be determined in administrative and perhaps subsequent judicial proceedings. The O'Leary

limitation of the term "person entitled to compensation" to the situation in which the claimant's employer has acknowledged liability and commenced payments seems to me fully consistent with the requirements of ordinary language.

It is true, as the Court observes, that under the O'Leary interpretation, the term "person entitled to compensation" would take on different meanings in different contexts. See ante, at ___, 120 L Ed 2d, at 391. This Court, however, has not inflexibly required the same term to be interpreted in the same way for all purposes. Compare Barnhill v Johnson, ___ U.S. ___, ___, and n. 9, 118 L Ed 2d 39, 112 S Ct 1386 (1992) with id., at ___, 118 L Ed 2d 39, 112 S Ct 1386 (Stevens, J., dissenting) (noting that the maxim is "not inexorable," but arguing that because "nothing in the [statute's] structure or purpose" counsels otherwise, the Court shou'd have applied it). This Court has recognized:

> "Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. . . .
>
> "It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance." Atlantic Cleaners & Dyers, Inc. v United States, 286 U.S. 427, 433, 76 L Ed 1204, 52 S Ct 607, 609 (1932).

This case is one in which the statutory term in question should be read contextually, rather than under the assumption that the term necessarily has the same meaning in all contexts. The phrase "person entitled to compensation" is not defined in the statute, and it is susceptible of at least two interpretations – a "formalist" interpretation, according to which one may be entitled to compensation whether or not anyone ever acknowledges that fact, and a "positivist" or "legal realist" interpretation, according to which one is entitled to compensation only if the relevant decisionmaker has so declared. Which of these two senses is "correct" will depend upon context. The latter sense, I have suggested, is appropriate to a context in which liability for compensation is disputed and the employee is called upon to predict the future course of administrative and perhaps judicial proceedings – not just as to liability, but as to the precise amount of liability. And, in any event, I think, the text and circumstances of the 1984 amendment to § 33(g) indicate that Congress intended to adopt the "realist" interpretation found in O'Leary.

Moreover, the Court simply has failed to apply, or even mention, a maxim of interpretation, specifically applicable to the LHWCA, that strongly supports Cowart's position. This Court long has held that " '[t]his Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' " Director, OWCP v Perini North River Associates, 459 U.S. 297, 315-316, 74 L Ed 2d 465, 103 S Ct 634 (1983), quoting Voris v Eikel, 346 U.S., at 333, 88 L Ed 5, 74 S Ct 88. The only point at which the Court in this case consults the purposes of the Act is at the end of its

opinion, when it assures the reader that its interpretation of the *notification requirement* of § 33(g)(2) – as opposed to its interpretation of the written approval requirement stated in § 33(g)(1) – is consistent with the statute's purposes. See ante, at ___, 120 L Ed 2d at 393. Finally, underscoring its refusal to apply the maxim of liberal construction to this case, the Court ultimately acknowledges that the interpretation of § 33(g) it has adopted has "harsh effects" and "creates a trap for the unwary." Ante, at ___, 120 L Ed 2d, at 394. For my part, I can imagine no more appropriate occasion on which the maxim should be applied.

4

Once it is recognized that a claimant whose employer denies LHWCA liability is not a "person entitled to compensation" for purposes of § 33(g)(1), the proper resolution of this case is clear. Cowart was just such a claimant, and, accordingly, he was not bound by § 33(g)(1)'s written approval requirement. It is undisputed that he satisfied the notice requirement of § 33(g)(2). It follows that § 33(g) is no bar to Cowart's eligibility for benefits.

III

The Court recognizes "the stark and troubling possibility that significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute." Ante, at ___, 120 L Ed 2d, at 394. It attempts to justify the "harsh effects" of its decision on the ground that it is but the faithful agent of the legislature, and "Congress has spoken with great clarity to the precise

question raised by this case." Ibid. In my view, Congress did not answer the question in the way the Court suggests, let alone did it do so "with great clarity." The responsibility for today's unfortunate decision rests not with Congress, but with this very Court.

I dissent.

INGALLS SHIPBUILDING DIVISION, LITTON SYSTEMS, INC., Petitioner,

v.

John H. WHITE and Director, Office of Workers' Compensation Programs, U. S. Department of Labor, Respondents.

No. 80-4002.

United States Court of Appeals,
Fifth Circuit.

July 26, 1982.

Paul M. Franke, Jr., Gulfport, Miss., John H. Carlson, Pascagoula, Miss., for petitioner.

Roy Axelrod, San Francisco, Cal., for amicus curiae Bethlehem Steel Corp. et al.

Mark C. Walters, Joshua T. Gillelan, II, U. S. Dept. of Labor, Washington, D. C., for Director, Office of Workers Compensation Programs.

Roland Skinner, Biloxi, Miss., for White.

Petition for Review of an Order of the Benefits Review Board.

Before CLARK, Chief Judge, THORNBERRY and GARZA, Circuit Judges.

THORNBERRY, Circuit Judge:

The Director of the Office of Workers' Compensation Programs, Department of Labor, asks this court to decide whether administrative law judges have the power to

approve compromise settlements under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.* The Director argues that the power to approve settlements under the LHWCA lies solely in the offices of the deputy commissioner and the Secretary. Appellant Ingalls Shipbuilding Division, Litton Systems, Inc., and Bethlehem Steel Corp. and Triple A Shipyards as amicus insist that administrative law judges share this authority. Ingalls urges in addition that the Director lacks standing either to appeal the approved compromise settlement to the Benefits Review Board or to appear before this court as an appellee defending the Board's order.

This dispute began with an event that appears far removed from the issues in this appeal. The LHWCA claimant, John W. White, was injured on February 17, 1977, in the course of his employment as a shipfitter for Ingalls Shipbuilding, when a 350-pound pressing ram crushed his right hand. After receiving compensation for temporary total disability, White sought relief under the LHWCA for any permanent injury he had sustained. His claim could not be resolved in the deputy commissioner's office because the parties could not agree on the extent of injury. The deputy commissioner, therefore, referred the claim to an administrative law judge (ALJ) for a formal hearing as permitted under 33 U.S.C. § 919.

Before a hearing could be held, however, on January 11, 1979, the parties informed the ALJ that they had agreed to a compromise settlement under 33 U.S.C. § 908(i)(A). The settlement was based on a medical report by Dr. L. Conrad Rowe, who found that White was suffering from a 25% permanent partial disability of the right

hand, but that he could continue to work if he refrained from lifting heavy objects. Under the terms of the settlement, Ingalls agreed to pay White $25,000, on the condition that it did not have to rehire him, and to pay all medical bills related to his injury. It also promised to pay White's attorney $2,300. The ALJ did not remand the case to the deputy commissioner to obtain his approval of the settlement terms. Instead, he issued an Order Approving Settlement on January 30, 1979. The order stated that the settlement was "in the best interests of Claimant" and "in accord with Clefstad v. Perini North River Associates, 9 BRBS 217, BRB No. 77-584 (1978)." The judge's reference to Clefstad is a crucial part of any order approving settlement. In this instance, however, it proved to be insufficient to sustain the order.

Upholding the authority of administrative law judges to approve settlements, the Benefits Review Board held in Clefstad that before he approves a proposed settlement, an ALJ must consider the claimant's age, education, work history, medical condition, and the availability of the type of work that the claimant is able to perform. 9 BRBS at 222. While the ALJ below cited Clefstad, he did not discuss the evidence underlying each Clefstad factor. This failure to follow Clefstad to the letter as well as fear that the $25,000 lump sum settlement would be inadequate to compensate the claimant for his injuries prompted the Director to appeal the order to the Benefits Review Board under 33 U.S.C. § 921(b)(3).

With the advantage of full briefing and oral argument, the Board rejected appellant's contention that the Director lacked standing to appeal the ALJ's order. It found that Congress intended the standing requirement

to appear before the Board to be satisfied more easily than the standing criteria for appearance in federal court. In fact, the Board held that the Director had "automatic" standing "in any case before the Board." Thus able to reach the merits of the ALJ's order approving settlement, the Board found the ALJ's treatment of Clefstad to be inadequate and remanded the order for "a complete rationale according to the guidelines set forth in Clefstad." Ingalls then appealed to this court under 33 U.S.C. § 921(c).

I. JURISDICTION

Section 921(c) of the LHWCA provides that "(a)ny party adversely affected or aggrieved by a *final order* of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred. . . . " 33 U.S.C. § 921(c) (emphasis supplied). Although none of the parties has raised the issue of whether the Board's action in this case constitutes a "final order," it is our threshold duty to determine whether we have subject-matter jurisdiction of this petition for review. Accordingly, we must inquire whether Ingalls' petition for review from a remand order of the Benefits Review Board is final under § 921(c).

The "final order" requirement of § 921(c) furthers the same policies as the finality rule embodied in 28 U.S.C. § 1291 (1976). Thus, finality under both statutes holds the same meaning. Director, Office of Workers' Compensation Programs v. Brodka, 643 F.2d 159, 161 (3d Cir. 1981). It is a well-established rule of appellate jurisdiction that a remand order to an administrative agency is ordinarily

not treated as a final order. *National Steel & Shipbuilding Co. v. Director, Office of Workers' Compensation Programs*, 626 F.2d 106, 108 (9th Cir. 1980).[1] This circuit has followed the rule of other circuits in holding that this general rule mandates dismissal of a petition for review from a remand order of the Benefits Review Board if the court finds that the Board's decision is not a final order. *United Fruit Co. v. Director, Office of Workers' Compensation Programs*, 546 F.2d 1224, 1225 (5th Cir. 1977).[2]

Like every rule, however, this principle of appellate jurisdiction has exceptions. *National Steel & Shipbuilding Co., supra*, 626 F.2d at 108. We hold that the appeal in this case falls within the exception to the final judgment rule as stated in *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-54, 85 S.Ct. 308, 311, 13 L.Ed.2d 199 (1964). In *Gillespie*, the administratrix of the estate of her son, Daniel, brought actions against the vessel owner-employer to recover damages for Daniel's death for herself and on behalf of Daniel's brother and sisters under the Jones Act and the Ohio wrongful death statute. The vessel owner moved to dismiss all reference to the laws of Ohio and the claims of Daniel's brother and sisters. The trial court granted the motion. Gillespie appealed for herself, joined by the brother and sisters. The vessel owner moved to

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[1] Similarly, a state supreme court decision remanding to a lower court is not a "final decision" under 28 U.S.C. § 1257. *O'Dell v. Espinoza*, ___ U.S. ___, 102 S.Ct. 1865, 72 L.Ed.2d 237 (1982).

[2] In *United Fruit Co.*, we dismissed the appeal as premature because the appellant had petitioned from an order of the Board remanding the case to the ALJ for a finding on the extent of the claimant's liability. 546 F.2d at 1225.

dismiss the appeal on the ground that the rulings appealed from were not "final" decisions under 28 U.S.C. § 1291. The Sixth Circuit reached the merits of the controversy without deciding the question of appealability. The Supreme Court reversed on the merits, but held that the decision of the trial court was "final" for purposes of § 1291.

The Court recognized that the question of finality was frequently so close that "it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality." 379 U.S. at 152, 85 S.Ct. at 311. The requirement of finality, therefore, "is to be given a 'practical rather than a technical construction.' " *Id., quoting from Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949). This practical assessment involves two competing considerations: " 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' " *Id.* at 152-53, 85 S.Ct. at 311. Finding that the eventual costs would be less if it reached the merits and that to do otherwise would unnecessarily delay recovery, the Supreme Court held that a practical interpretation of § 1291 justified its maintaining jurisdiction of the appeal.[3]

We conclude that a decision on the merits of this appeal does not raise the spector of piecemeal review

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[3] For recent decisions discussing *Gillespie, see Weil v. Investment Indicators Research & Management*, 647 F.2d 18, 27 (9th Cir. 1981); *United States v. Mississippi Power & Light Co.*, 638 F.2d 899, 903 (5th Cir. 1981), *cert. denied*, 454 U.S. 892, 102 S.Ct. 387, 70 L.Ed.2d 206 (1981).

before the court. The only issue presented that is directly related to the remand order is whether the ALJ made the appropriate findings in his original order approving settlement. The remaining issues, which involve the standing of the Director and the authority of the ALJ to approve lump-sum settlements, are purely matters of law and are "final" in that they have been litigated and decided by the Benefits Review Board. The question of whether the ALJ's order approving settlement conformed with *Clefstad* does not undermine finality in this instance for the following reasons.

If we were to dismiss for lack of jurisdiction to allow the ALJ to reconsider the settlement and if we were to find on a later appeal that the ALJ lacked authority to approve lump-sum settlements, a dismissal at this stage in the proceedings would be entirely purposeless, for the ALJ's power to reconsider the settlement depends completely on our interpretation of the relevant enabling statute. This result would create much greater "cost and inconvenience" than would an immediate decision on the merits. Moreover, a dismissal with the threat of reversal on future appeal ultimately could work a harsh injustice on the claimant, since the delay caused by dismissal could put him that much further off from the recovery to which he unquestionably is entitled. Failure to dismiss, by contrast, poses no similar potential for prejudice to Ingalls.

Wescott v. Impresas Armadoras, S. A. Panama, 564 F.2d 875, 881 (9th Cir. 1977), supports our consideration of these consequences. Wescott sued Impresas for injuries he sustained while working as a longshoreman employed by Brady Hamilton Stevedore Company aboard a ship

owned by Impresas. Brady intervened to deny its negligence and to recover against Impresas any monies paid to Wescott for workmen's compensation. The jury decided the special issues in favor of the longshoreman, and the district court denied Impresas' motion for judgment notwithstanding the verdict. In denying the motion, the district judge did not address the intervening employer's counterclaim against Impresas. Applying the "practical" test of *Gillespie*, the Ninth Circuit refused to dismiss the appeal to permit the district court to resolve the dispute as to the intervenor's rights against Impresas for two reasons, both of which are compelling in the instant appeal. First, the intervenor's rights turned solely on matters of law. *See also Lockwood v. Wolf Corp.*, 629 F.2d 603, 608 n.3 (9th Cir. 1980); *Aetna Life Insurance Co. v. Harris*, 578 F.2d 52, 54 n.1 (3d Cir. 1978). Second, the court recognized that if it held that the district court should have granted the motion for judgment notwithstanding the jury verdict, then a dismissal to the trial court would be futile because the intervenor's rights were dependent on a judgment in favor of the plaintiff – just as the ALJ's authority in this case is dependent on a decision in favor of Ingalls.

Upon balancing the competing considerations above, we find that the facts here fall within the unique situation that is established as an exception to technical finality in *Gillespie*. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 478 n.30, 98 S.Ct. 2454, 2462 n.30, 57 L.Ed.2d 351 (1978). We, therefore, hold that the decision of the Benefits Review Board is a final order within the meaning of § 921(c), and that we may properly entertain jurisdiction of the appeal.

II. ORDER APPROVING SETTLEMENT

Appellant contends at the outset that the ALJ's order approving settlement is analogous to a consent decree and that the Director, therefore, cannot appeal to the Benefits Review Board in the absence of proof that would nullify the parties' consent. Appellant cites no law to justify this conclusion, and we find it both unpersuasive and erroneous.

Though there is no authority specifically addressing the reviewability of an order approving settlement of a LHWCA claim, there is instructive precedent on the reviewability of consent decrees in other contexts. *See United States v. City of Miami*, 664 F.2d 435, 441 nn. 10-13 (5th Cir. 1981) (en banc), where the court discusses the responsibilities of district and appellate courts in assessing settlements of class actions, stockholders' derivative suits, and compromises of claims in bankruptcy. It is clear that when the district judge is required by law to ascertain specific facts before approving a settlement, the appellate court will examine that determination to ensure that it is "fair, adequate and reasonable." Contrary to appellant's assertions, review is not limited to ascertaining whether consent is valid or whether the district judge abused his discretion: "(T)he degree of appellate scrutiny must depend on a variety of factors, such as the familiarity of the trial court with the lawsuit, the stage of the proceeding at which the settlement is approved, and the type of issues involved. *United States v. City of Alexandria*, 614 F.2d 1358, 1361 (5th Cir. 1980).

Thus, even if we accept Ingalls' contention that an order approving settlement is like a consent decree, we

find that an ALJ, in approving the settlement of a LHWCA claim, is limited in the same manner as a district judge approving a compromise in a class action or stockholders' derivative suit. Though the criteria for approval are different, the purpose of approval is the same – to protect the interests of the parties within constitutional and statutory strictures and to ensure that the decree is consistent with the public policy objectives sought to be attained by Congress in enacting the statutory right of action. *City of Miami, supra,* 664 F.2d at 441. The ALJ in examining a proposed settlement of longshoreman's claim is required to consider specific facts that help determine the size of award that the claimant deserves. *Clefstad, supra,* 9 BRBS at 222. The Benefits Review Board, like any appellate court, plays an indispensable role in overseeing settlement approval just as it did in this case: if review was precluded, there would be no check on ALJ approval, a result that could frustrate Congress' intent in passing the LHWCA. The likelihood of frustrating legislative intent appears even greater in a case such as this one, where the power of the ALJ to approve agreed settlements in the first instance is at issue. Thus, even if we treat the ALJ's order approving settlement like a consent decree, as appellant bids us, we find ample support in law and logic for holding that it is reviewable.

III. DIRECTOR'S STANDING TO APPEAL

As this court explained in *Director, Office of Workers' Compensation Programs v. Donzi Marine, Inc.,* 586 F.2d 377, 378 (5th Cir. 1978), the 1972 amendments to the LHWCA provide a two-step process for review of any compensation order entered under the Act by a duly appointed

hearing officer. 33 U.S.C. § 921 (1976). Under section 921(b), "any party in interest" may appeal the decision of the hearing officer to the Benefits Review Board. Subsequently, "any person adversely affected or aggrieved by a final order of the Board" may appeal that order to the United States court of appeals for the circuit in which the injury occurred. 33 U.S.C. § 921(c). Ingalls argues that the Director is neither a "party in interest" nor a "person adversely affected or aggrieved," and that therefore, the Director has no standing either to petition the Benefits Review Board or to act as respondent in this appeal. We examine each of these contentions in turn.

A. The Director's Standing to Respond to Proceedings Brought Under § 921(c)

First, we must dispose of Ingall's argument that the Director lacks standing to respond in this court. Ingalls relies for the strength of its argument on a line of cases that deny the Director standing as a petitioner under § 921(c) because he is not a "person adversely affected or aggrieved." *See Director, Office Workers' Compensation Programs v. Bethlehem Steel Corp.,* 620 F.2d 60 (5th Cir. 1980); *Fusco v. Perini North River Associates,* 601 F.2d 659, 670 (2d Cir. 1979), *vacated on other grounds,* 444 U.S. 1028, 100 S.Ct. 697, 62 L.Ed.2d 664 (1980), *on remand* 622 F.2d 1111, *aff'd,* 449 U.S. 1131, 101 S.Ct. 953, 67 L.Ed.2d 119 (1981); *Donzi Marine, supra,* 586 F.2d at 382; *I.T.O. Corporation of Baltimore v. Benefits Review Board,* 542 F.2d 903, 909 (4th Cir. 1976), *vacated sub nom. Adkins v. I.T.O. Corp. of Baltimore,* 433 U.S. 904, 97 S.Ct. 2967, 53 L.Ed.2d 1088, *rev'd on remand on other grounds,* 563 F.2d 646, 648 (1977). Apart

from *I.T.O.*, these cases do not address the question of when the Director may appear as a respondent, and therefore, they are distinguishable from the Director's position here. Upon examining *I.T.O.* and the other decisions addressing the issue of when the Director may appear as a respondent in a federal court of appeals, *see Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479 (D.C.Cir.1982); *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30 (1st Cir. 1980), *cert. denied*, 452 U.S. 938, 101 S.Ct. 3080, 69 L.Ed.2d 952 (1981); *United Brands Co. v. Melson*, 569 F.2d 214 (5th Cir. 1978) (single judge order); *Krolick Contracting Corp. v. Benefits Review Board*, 558 F.2d 685, 689-90 (3d Cir. 1977); *Nacirema Operating Co., Inc. v. Benefits Review Board*, 538 F.2d 73, 75 (3d Cir. 1976); *Offshore Food Services, Inc. v. Benefits Review Board*, 524 F.2d 967 (5th Cir. 1975); *McCord v. Benefits Review Board*, 514 F.2d 198, 200-01 (D.C.Cir.1975), we hold that the Director is a proper party before this court.[4]

While this Court has recognized previously that the Director must establish some pecuniary or administrative interest to petition the court of appeals for review under 33 U.S.C. § 921(c), *Bethlehem Steel Corp., supra*, 620 F.2d at 60, and *Donzi, supra*, 586 F.2d at 382, no panel in this Circuit has discussed the issue of when the Director

[4] The Supreme Court has expressly declined to rule on this issue: "Petitioners named the Director rather than the BRB as a respondent in the Court of Appeals and neither party has raised any question in this Court concerning the identity of the federal respondent. This question is therefore not before us." *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 256 n.11, 97 S.Ct. 2348, 2353, 53 L.Ed.2d 320 (1977).

could appear as a respondent.[5] We, therefore, must cut through the bramble of conflicting legal doctrines and determine the appropriate rule for this Circuit. *Compare I.T.O., supra*, 542 F.2d at 909, with *Shahady, supra*, 673 F.2d at 481-84.

We have discovered three possible grounds for decision. First, we could require the Director to demonstrate

[5] The issue has been raised in this Circuit, but no panel has provided a rationale by which to decide the question. In *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 546 (5th Cir. 1976), *vacated sub nom on other grounds*, 433 U.S. 904, 97 S.Ct. 2967, 53 L.Ed.2d 1088 (1977), *on remand*, 575 F.2d 79 (5th Cir. 1978), *aff'd*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979), the court allowed the Director to respond because a prior panel in the same case granted the Director's motion to be added as a respondent. The latter decision apparently was unpublished. Neither of the panel opinions discuss the appropriate standard for allowing standing to respond, and the unique procedural facts of the case have been construed to diminish its precedential value. *See Director, Office Workers' Compensation Programs v. Peabody Coal Co.*, 554 F.2d 310, 333-34 (7th Cir. 1977).

In *Offshore Food Service, supra*, 524 F.2d at 967, this Court in a per curiam decision granted a motion by the Benefits Review Board to dismiss it as a party respondent under § 921(c). The court relied on cases granting similar motions by the Board on the ground that the Board was not a necessary party to the appeal. Since there is no analysis of the question in Offshore Food Service, it is impossible to discern the specific basis for the court's decision. Furthermore, the Director rather than the Board is seeking to respond in the instant case. The decision, therefore, does not eliminate the problem before us. By contrast, Judge Roney in *United Brands Co. v. Melson, supra*, 569 F.2d at 215, examines the issue at length, but his opinion is a single judge order, and as such, it lacks the precedential weight of a panel decision. We have concluded, in view of these decisions, that the issue merits full examination.

some injury in fact, economic or otherwise, to justify his standing as respondent in § 921(c) proceedings, just as we did when the Director sought to petition this Court for review in *Donzi, supra*. Second, we could rely on the broad language of Fed.R.App.P. 15(a), which requires a petitioner for review of an agency order to name the agency as a respondent. Finally, we could consider the statutory scheme of the LHWCA and regulations promulgated thereunder as the D.C. Circuit did in *Shahady, supra*, 673 F.2d at 481-83. For the following reasons, we rely on Rule 15(a).

Ingalls urges us to adopt the first approach, which has been articulated most strongly by judges in the Fourth Circuit. In *I.T.O.*, a divided en banc panel held that the Director was required to show a stake in the outcome of the controversy in order to respond to a petition for review under § 921(c). *I.T.O., supra*, 542 F.2d at 907. To reach this conclusion, the court relied solely on the language of the section itself: "Since the Act is not specific, it follows that, if the Director is to be named a party, he must be 'adversely affected or aggrieved by a final order of the Board' within the meaning of § 921(c)." *Id.* The court made no distinction between respondents and petitioners and did not discuss Rule 15(a). Applying § 921(c), the court engaged in the traditional inquiry of whether the Director had suffered an "injury in fact." The court found that the Director's general duty to assist claimants and provide them legal assistance did not give him a sufficient stake in the outcome to permit him to respond as a matter of right. It admitted, however, that the Director could seek permissive intervention under Fed.R.Civ.P. 24(b), and that his application ordinarily

would be granted. The court did not apply Rule 24(b) to the case before it because the Director had made no motion under the Rule.[6]

We do not follow the Fourth Circuit. If the Director has standing to petition the Review Board under § 921(b)(3), an issue that we will examine subsequently, then he should have the right to appear in this court to defend a decision by the Board in his favor. The absence of any contrary language in § 921(c), or elsewhere in the LHWCA, referring to the agency's capacity to respond suggests to us, not that the Director should be included in the "adversely affected or aggrieved" requirement that governs who may petition for review, but that his standing to respond is governed by other rules.

Rule 15(a) of the Federal Rules of Appellate Procedure provides the method for obtaining review of an order of an administrative agency in the court of appeals: "The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. . . . In each case, the agency shall be named respondent." "Agency" as defined in the rule includes "agency, board, commission or officer." Rule

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[6] The Fourth Circuit recently applied its analysis in *I.T.O.* to allow the Director to respond under § 921(c). In *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 113 (4th Cir. 1982), the Director petitioned for review of the Board's finding that an employee qualified for compensation from a special fund established in 33 U.S.C. § 908. Because the Director is charged with administering the special fund, and protecting it from unjustified claims, the court held that he had "more of a direct interest than the Director did in *I.T.O. Corp.*" *Id.* at 113. *But see Shahady v. Atlas Tile & Marble Co., supra*, 673 F.2d at 483.

15(a) is generally applicable to statutory review proceedings within this Court's original jurisdiction. This Court has such jurisdiction under § 921(c). Prior to 1972, § 921(c) identified the "deputy commissioner making the order" as a respondent. The amended version of § 921(c) is silent as to who shall appear as respondent for the agency, but the Secretary has filled that gap by promulgating 20 CFR § 802.410(b), which names the Director to represent the Department of Labor in review proceedings. Thus, it appears that the rule requires Ingalls to name the Director as respondent in its petition.

Despite the blunt, and seemingly mandatory requirement of Rule 15(a), however, the courts have created an exception to its applicability in cases where the private parties seeking review of an agency proceeding are sufficiently adverse. As the D.C. Circuit explained in *McCord, supra*: "Normally, a single private party is contesting the action of an agency, which [the] agency must appear and defend on the merits to insure the proper adversarial clash requisite to a 'case or controversy.' . . . Here there is sufficient adversity between McCord and Mrs. Cepthas (the claimant) to insure proper litigation without participation by the Board." 514 F.2d at 200. The court concluded that the rationale of Rule 15(a) does not apply in this circumstance. We do not consider here the wisdom of adopting this judicial exception as a precedential rule in this Circuit because we are not faced with the question. Adversity clearly exists between Ingalls and the Director for there would be no respondent without the presence of the agency. Rather, we need only decide whether Rule 15(a) is generally applicable to review proceedings under § 921(c).

The D.C. Circuit recently has avoided reliance on Rule 15(a) when faced with the issue. *Shahady, supra*, 673 F.2d at 484. It held in *Shahady* that "the Director, OWCP shall be named as federal party-respondent in all petitions for review brought under section 21(c) of the LHWCA, 33 U.S.C. § 921(c)." *Id.* at 485. The Court relied on the "Director's central role in the legislative and regulatory scheme" created by the LHWCA. It declined to rest its decision on Rule 15(a) primarily because it believed that the rule applies only to a proceeding where the agency respondent appears to defend the commission or board decision as the legal representative of the agency. 673 F.2d at 484. It reasoned that because the Director can disagree with the Board's decision, as he has in this case, he is not the "agency" interest referred to in Rule 15(a). We do not agree with the D.C. Circuit's construction of Rule 15(a). While it may provide a sound basis for allowing the agency to withdraw from a petition for review when it seeks to do so, it does not apply to a proceeding in which the Director demands to appear as a respondent. We find no language in the comments to rule 15(a), in the cases construing it, or in the major treatises to mandate this restrictive interpretation of the Rule. Certainly, under some statutory schemes the agency will be the only party in opposition to the claimant, particularly when the claimant is seeking benefits from the government instead of his employer. When the agency participates as a respondent in these types of proceedings, it represents the agency position in a typical adversarial posture. The LHWCA, admittedly, does not envision a procedural scheme of this nature, but this distinction does not render the plain language of Rule 15(a) inapplicable.

First, the broad language of Rule 15(a)[7] suggests an intent to encompass a wide variety of agency proceedings. It also indicates a recognition that the agency would not be the only respondent in a petition for review of an agency order. This would account for the potential "three party case" that may arise under the LHWCA, in which the claimant, his employer, and the Director participate. The only express limitation on the applicability of Rule 15(a) is found in Fed.R.App.P. 1(b), which provides that the rules cannot be construed to extend or limit the

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[7] Rule 15(a) provides in entirety:

(a) Petition for Review of Order; Joint Petition. Review of an order of an administrative agency, board, commission or officer (hereinafter, the term "agency" shall include agency, board, commission or officer) shall be obtained by filing with the clerk of a court of appeals which is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" shall include a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal). The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency shall be named respondent. The United States shall also be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

jurisdiction of the courts of appeals. Allowing the Director to respond to a petition for review in proceedings under § 921(c) does not cross the bounds of this restriction.

Second, the review procedures established by the 1972 Amendments to the LHWCA and the regulations promulgated thereunder suggest that Rule 15(a) applies to proceedings under § 921(c). As the Third Circuit in Krolick recognized, the failure of the Act to name a respondent is instructive:

> The reference to a specific agency respondent in the pre-1972 version of 33 U.S.C. § 921(b) was included prior to the adoption of the Federal Rules of Appellate Procedure. Perhaps although no clear legislative history on the subject has been called to our attention, the omission of a reference to the proper respondent when § 921(b) was amended in 1972 was a conscious recognition of the more general reference in Rule 15(a).

Krolick, supra, 558 F.2d at 689-90.[8] Furthermore, the Director is unmistakably the entity within the agency who "represents" the agency. The Director is the administrator of the Act, and he therefore bears the responsibility of ensuring its fair and consistent operation.[9] The Secretary has provided specifically that: "The Director, OWCP as

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[8] Prior to 1972, there was no subsection c to § 921. The "§ 921(b)" referred to in *Krolick* set out the procedure for appeal prior to 1972 which was replaced in 1972 by 33 U.S.C. § 921(c).

[9] Congress has charged the Secretary with the duty to administer the Act, 33 U.S.C. § 939, but the Secretary has delegated that duty to the Director, 20 C.F.R. § 701.201.

designee of the Secretary of Labor responsible for the administration and enforcement of the [Act], shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA." 20 C.F.R. § 802.410(b).

The broad language of Rule 15(a) must be applied with a common sense regard for the variety of agency proceedings that produce appealable administrative orders. When a party decides to petition for review of an agency's order, it generally should name as respondent under Rule 15(a) that entity within the agency that the agency head has designated to respond on behalf of the agency. We conclude, then, reading Rule 15(a) together with the LHWCA and the regulations promulgated thereunder, that the Director is the agency-respondent within the contemplation of Rule 15(a), and that therefore, he is entitled to respond in this Court over Ingall's objection.

B. The Director's Standing to Petition the Benefits Review Board

Having decided that the Director is a proper party respondent in this appeal, we now must turn to the issue of whether the Director was entitled to petition the Board for review of the ALJ's order approving settlement as a "party in interest" under 33 U.S.C. § 921(b)(3). The Board found that the Director had automatic standing under 20 C.F.R. § 802.201(a), which defines "party" or "party in interest" to mean "The Secretary or his designee and any person or business entity directly affected by the decision or order from which an appeal to the Board is taken." Though this Circuit has recognized the Director's right to

seek review automatically in dicta, it has not faced squarely the contention that Congress never intended the Director to appear before the Board in a case where the claimant and employer agree. *Donzi, supra*, 586 F.2d at 378 n.5. We hold today that the Director is a "party in interest" under § 921(b) (3) as defined in 20 C.F.R. § 802.201(a), and therefore, that he was entitled to petition the Benefits Review Board for review of the order approving settlement of White's claim.

Ingalls asks this Court to apply the analysis of *Donzi* to this question of administrative standing. Again, we point out that *Donzi* was limited to the issue of whether the Director had judicial standing to petition this Court for review under § 921(c). *Donzi* would control standing under § 921(b)(3) only if this Court found that § 921(c) and § 921(b)(3) designate the same class of persons as parties. We reject Ingalls' proposed rationale for several reasons.

First, and fundamentally, administrative proceedings before the Benefits Review Board are not Article III proceedings to which either the "case or controversy" or prudential standing requirements apply. *See American Trucking Associations, Inc. v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982). Within their legislative mandates, agencies are free to hear actions brought by parties who might be without standing if the same issues happened to be before a federal court. *Ecee, Inc. v. Federal Energy Regulatory Commission*, 645 F.2d 339, 349 (5th Cir. 1981). In fact, Congress in its discretion can require that any person be admitted to administrative proceedings whether or not that person has alleged an "injury in fact." *Koniag, Inc., UYAK v. Andrus*, 580 F.2d 601, 612 (D.C.Cir.1978)

(Bazelon, J. concurring), *cert. denied*, 439 U.S. 1052, 99 S.Ct. 733, 58 L.Ed.2d 712 (1978). Moreover, cases construing § 921(c) have indicated that an "aggrieved party" under that subsection is not a "party in interest" under § 921(b)(3). *Donzi, supra*, 586 F.2d at 378 n.5; *I.T.O., supra*, 542 F.2d at 908. The imposition of less restrictive standing requirements on administrative adjudicatory bodies simply recognizes that they often act as "legislative courts," and as such, they demand a wider discretion than Article III courts to determine who may appear before them. *See Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C.Cir.1976).

Second, by using two distinct phrases – "parties in interest" and "persons adversely affected or aggrieved" – Congress reveals an intent to establish two distinct tests for standing to petition for review of administrative orders issued under the Act. The Secretary of Labor, pursuant to his general authority to prescribe regulations under the LHWCA, treats § 921(b)(3) and § 921(c) as if they created different standards. "Party in interest" means the Secretary, his designee, and anyone "directly affected" by the order. 20 C.F.R. § 801.2(a)(10). Under 20 C.F.R. § 802.410(a), by contrast, only persons "adversely affected or aggrieved" may petition for review in the court of appeals.

A finding that *Donzi* does not control the meaning of party in interest unfortunately does not end our inquiry. We cannot discuss the statutory and regulatory language relevant to this issue as briefly as we would like because Ingalls has drawn our attention to an apparent contradiction in the regulations that on its face seems to negate our interpretation of § 921(b)(3). Ingalls also demands that we invalidate 20 C.F.R. § 801.2(a)(10) as an unconstitutional

extension of agency authority since it arguably goes beyond the "interest" requirement of § 921(b)(3) by conferring automatic standing on the Director. To resolve the issue of the Director's administrative standing we must turn to these problems in regulatory construction.

First, we will address the superficial inconsistency in the regulations. In addition to defining "party in interest" and limiting the parties who may appeal to the courts of appeals, the Secretary also states "(a)ny party *adversely affected* by a decision or order issued pursuant to one of the Acts may appeal that decision or order to the Board by filing a notice of appeal." 20 C.F.R. § 802.201 (emphasis supplied). Ingalls insists that this regulation equates "party in interest" to persons "adversely affected or aggrieved" in § 921(c). We disagree. Obviously, Ingalls' proposed construction of the regulation would be inconsistent with Congress' intent to create two separate standing tests. We prefer to construe the regulations in a manner that is in harmony with that intent. It is not unusual or extraordinary to find that similar phrases have more than one meaning in statutory and regulatory sections that embody separate purposes. This happens frequently in the sentences that constitute our laws, and it is indicative, not of bureaucratic confusion, but of the truth that we have a finite set of words to describe an infinite variety of situations. Reading § 802.2(a)(10) and § 802.201 together, we find that "adversely affected" in the context of § 921(b)(3) does not contradict the phrase "directly affected." As a practical matter, the Director will not petition the Board for review unless the administrative order has affected his interests in an adverse manner. The real question under the regulations, then, is not

whether the effect is adverse, but whether the Director has an interest that has been affected directly by the order. We therefore, find that 20 C.F.R. § 802.201 adds no substantive meaning to the definition of "party in interest" in § 801.2(a)(10), and that the regulations interpreting § 921(b)(3) and § 921(c) do not impose the requirements of judicial standing on the parties who appear before the Board.

Now we must decide whether the definition of "party in interest" in § 801.2(a)(10), which gives the Director an automatic right of review, is valid in view of the plain requirement in 33 U.S.C. § 921(b)(3) that a person demonstrate some "interest" before petitioning the Board for review. Unless clearly erroneous or unreasonable, the interpretation of a statute by a regulatory agency that is charged with administering it is given considerable deference by federal courts. *Florida v. Mathews*, 526 F.2d 319, 323 n.10 (5th Cir. 1976). *See also Marshall v. Whirlpool Corp.*, 593 F.2d 715, 721 (6th Cir. 1979), *aff'd*, 445 U.S. 1, 100 S.Ct. 883, 63 L.Ed.2d 154 (1980). Moreover, the Supreme Court has made it emphatically clear that absent some constitutional or statutory constraint "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*, 435 U.S. 519, 544, 98 S.Ct. 1197, 1211, 55 L.Ed.2d 460 (1978), *quoting from FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143, 60 S.Ct. 437, 441, 84 L.Ed. 656 (1940). Bearing in mind the foregoing doctrines, we turn to the

issue of whether 20 C.F.R. § 801.2(a)(10) is a valid construction of § 921(b)(3). Resolution of this question depends on whether the Director's statutory duties under the LHWCA automatically establish an "interest" directly affected by a compensation order.

The Director of the Office of Workers' Compensation Programs is an office of administrative creation to which the Secretary of Labor has delegated the responsibility of administering the Act. 20 C.F.R. §§ 701.201, 701.202(a). That Congress intended the Secretary to play an active role in implementing, administering and enforcing the LHWCA is manifest from a reading of the Act and from an examination of its legislative history. For example, the Director must furnish upon request information and assistance to claimants regarding their legal rights and medical and vocational rehabilitation services. 33 U.S.C. § 939(c). He must actively supervise the medical care rendered to injured employees. 33 U.S.C. § 907(b). He administers a special fund established by the Act for payment of certain benefits in enumerated circumstances. 33 U.S.C. § 944. And, as a preventive measure, the Act allows the Director to bring an action in federal court to restrain violations of his safety regulations. 33 U.S.C. § 941(e).

Ensuring the active involvement of the Secretary through his Director was one of the central purposes underlying the 1972 Amendments:

> Section 39 of the Act (33 U.S.C. § 939) is amended to substantially increase the Secretary's responsibility for administering this program so far as providing services to employees. . . . It is intended that this assistance

> be all inclusive and enable the employee to receive the maximum benefits due to him without having to rely on outside assistance other than that provided by the Secretary.

S.Rep.No. 92-1125, 92d Cong., 2d Sess. (1972); H.R.Rep.No. 92-1441, 92d Cong., 2d Sess., *reprinted in* 1972 U.S.Code Cong. & Ad.News 4698, 4710. In a later statement, the Committee on Human Resources, successor to the Committee on Labor and Public Welfare, issued a report on the Black Lung Benefits Reform Act, which speaks directly to the standing of the Director within the review procedures established by the LHWCA:

> In establishing the Longshore Act procedures it was the intent of this Committee to afford the Secretary the right to advance his views in the formal claims litigation context whether or not the Secretary had a direct financial interest in the outcome of the case. The Secretary's interest as the officer charged with the responsibility of carrying forth the interest of Congress with respect to the Act should be deemed sufficient to confer standing on the Secretary or such designee of the Secretary who has the responsibility for enforcement of the Act, to actively participate in the adjudication of claims before the Administrative Law Judge, Benefits Review Board, and appropriate United States Courts.

S.Rep.No. 95-209, 95th Cong., 1st Sess. 22 (1977).[10] *See also Director, Office of Workers' Compensation Programs v.*

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[10] Although this 1977 report does not have the authoritative value of legislative history made contemporaneously with the passage of the 1972 amendments, it nevertheless is persuasive extrinsic evidence of congressional intent, particularly in

Newport News Shipbuilding & Dry Dock Co., 676 F.2d 110, 114 (4th Cir. 1982).

Despite persuasive evidence that Congress intended the Director to have standing as a party in interest under § 921(b)(3), Ingalls insists that the wide ranging supervisory responsibilities of the Director cannot justify the Director's interference when the claimant and employer agree on a settlement. The restrictive manner in which the Act treats lump-sum settlements belies this proposition. The LHWCA specifically limits the circumstances under which an employee may resolve his claim under the act through an agreed settlement with his employer.[11] If the private parties have agreed on the future liability of the employer, § 908(i)(A) demands that they obtain the approval of a deputy commissioner. If the settlement involves medical benefits, then the parties must obtain the approval of the Secretary. 33 U.S.C. § 908(i)(B). The settlement will not receive the approval of the Secretary or the deputy commissioner unless it is "in the best interests" of the claimant. The Board, in finding that administrative law judges share the authority to approve settlements under section 8(i)(A), has established in addition to the statutory prerequisites a set of criteria that must be considered before a settlement can be deemed

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view of Congress' silence on the standing question when it passed the 1972 Amendments to the LHWCA. *See Director, Office of Workers' Compensation Programs v. Boughman*, 545 F.2d 210, 216 (D.C.Cir.1976).

[11] In a similar manner, Congress has prohibited waiver, 33 U.S.C. § 915(b), and assignment, 33 U.S.C. § 916, of LHWCA claims, except as permitted by other sections of the Act.

"in the best interests" of the claimant. *Clefstad, supra,* 9 BRBS at 222.

The Director's interest as administrator within this procedural scheme for settlement approval appears obvious. First, he must make sure that the deputy commissioners and the administrative law judges are acting within their authority. Second, he must examine orders approving settlement to determine whether the approving authority considered the correct criteria. The Director's participation in the case before us, more clearly than any example we might conjure, demonstrates the need for us to respect his "watchdog" role. We, therefore, do not regard the Director's exercise of his right to initiate review of an order approving settlement as "officious intermeddling." To the contrary, it is simply part of his statutory obligation to ensure the fair and adequate compensation of injured employees.

In light of the Director's involvement in the administration and enforcement of the Act and Congress' intent with respect to that role, 20 C.F.R. § 201.2(a) is a reasonable and valid construction of 33 U.S.C. § 921(b)(3). Accordingly, we hold that the Benefits Review Board properly granted the Director standing to petition for review of the ALJ's order approving settlement.

IV. AUTHORITY OF ADMINISTRATIVE LAW JUDGES TO APPROVE AGREED SETTLEMENTS UNDER THE LHWCA

Having determined that the Director is a proper party before this Court, we reach the question of whether an administrative law judge has the authority to approve

a compromise settlement under 33 U.S.C. § 908(i)(A). That subsection provides:

> Whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled compensation, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of section 915(b) and section 916 of this title. . . .

Interpreting § 908(i)(A) in *Clefstad v. Perini North River Associates,* 9 BRBS 217, 220, BRB No. 77-884 (1978), the Benefits Review Board found that "both deputy commissioners and administrative law judges, within their respective spheres of authority, are empowered by the Act to approve or disapprove agreed settlements by the parties according to the claimant's best interests." The Board relied primarily on legislative history accompanying the 1972 Amendments to § 908 and on the 1972 amendment of 33 U.S.C. § 919(d). The latter amendment transferred "all powers, duties, and responsibilities" with respect to administrative hearings under the Act from the deputy commissioner to administrative law judges. Looking to the Administrative Procedure Act (APA) to define the scope of an officer's hearing functions, the Board determined that settlement approval lies within the adjudicative province of the ALJ once he "dons his judicial hat." 9 BRBS at 222. It is for this Court to decide whether the Board's reasoning in *Clefstad* as applied to this case is correct.

No circuit court has discussed and decided the precise issue before us. In *Marine Concrete v. Director, Office of*

Workers' Compensation Programs, 645 F.2d 484 (5th Cir. 1981), this Court construed a companion section, § 908(i)(B), which provides:

> Whenever the Secretary determines that it is for the best interests of injured employee entitled to medical benefits, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such medical benefits.

33 U.S.C. § 908(i)(B). We held that administrative law judges were not empowered by this section to approve settlements involving medical benefits: " 'It is not our province . . . to write legislation that Congress either overlooked or designedly chose not to write.' " *Id.* at 487, *quoting from S. H. DuPuy v. Director, Office of Workers' Compensation Programs*, 519 F.2d 536, 541 (7th Cir. 1975), *cert. denied*, 424 U.S. 965, 96 S.Ct. 1459, 47 L.Ed.2d 732 (1976).[12] Though we noted the legislative history behind § 908(i)(A), we did not address the authority of an ALJ to approve settlements under that section.[13] Confronting the

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[12] In *DuPuy* the Seventh Circuit held that neither deputy commissioners nor administrative law judges are authorized to approve settlements of death claims under the LHWCA. A death claim is not lodged under § 908 but under 33 U.S.C. § 909, which is silent on whether settlements of death claims are permitted. The court did not decide whether an ALJ has the power to approve a settlement agreement in the case of an injured employee. 519 F.2d at 541.

[13] *Ingalls Shipbuilding Corp. v. Joyner*, 587 F.2d 649 (5th Cir. 1978), on petition for rehearing, 587 F.2d 650 (5th Cir. 1979), is another case related to the issue at hand but not controlling. In *Joyner*, we considered the issue of whether this Court has the power to approve a compromise settlement and dismiss an

issue for the first time, we stress that although this Court will defer to the Board's decision in some instances, *see Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 177 (5th Cir.), *cert. denied*, 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 190 (1977), it is elementary that we are not bound by an erroneous interpretation of a statute. *Charter Limousine v. Dade County Board of County Commissioners*, 678 F.2d 586, 588 (5th Cir. 1982); *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 1011 (5th Cir. 1981), *cert. denied*, 554 U.S. 1080, 102 S.Ct. 633, 70 L.Ed.2d 613 (1982). We do not need precedent to recognize that § 908(i)(A) is plain on its face in stating that deputy commissioners may approve agreed settlements. Generally when there is no ambiguity in the words of a statute, a court may not consider legislative history or other rules of construction. *United States v. Oregon*, 366 U.S. 643, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961); *Connecticut v. United States E.P.A.*, 656 F.2d 902, 909 (2d Cir. 1981); *Glenn v. United States*, 571 F.2d 270, 271 (5th Cir. 1978). While we think § 908(i)(A) is sufficiently clear to fall within this simple rule of construction, Ingalls would argue that other sections in the

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appeal from a Board decision. The employer's settlement offer was conditioned on our approval. It provided for withdrawal if we remanded to the Director for approval. We, therefore, followed our action in an unreported case, *Ingalls Shipbuilding Corp. v. Spicer* (5th Cir. 1975) [Slip Op. No. 74-3465, April 18, 1975], and approved the settlement without confronting the problem of jurisdiction. Since *Spicer* also avoids the jurisdictional issue and since the disposition of *Joyner* is expressly limited to its facts, *Joyner, supra*, 587 F.2d at 650, we do not regard these circumscribed decisions as creating a precedential rule that controls our conclusion in this case. *See Marine Concrete, supra*, 645 F.2d at 488.

1972 Amendments to the LHWCA, specifically 33 U.S.C. § 919(d), give rise to the possibility of alternative interpretations.

> Section 919(d) of the Act provides:
>
> > Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of Section 554 of Title 5. Any such hearing shall be conducted by an administrative law judge qualified under 3105 of that Title. All powers, duties, and responsibilities vested by this Chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

33 U.S.C. § 919(d). We do not think the addition of APA procedures or the delegation of responsibilities to administrative law judges in the Act contradicts the plain mandate of § 908(i)(A) that only deputy commissioners can approve agreed settlements.

The context in which § 919(d) was passed suggests that Congress did not intend to transfer the power to approve settlements to the administrative law judges. Prior to the 1972 Amendments, deputy commissioners could approve agreed settlements only with the approval of the Secretary. *See* S.Rep.No.92-1125, 92d Cong., 2d Sess. 38 (1972). In 1972, Congress eliminated the necessity of obtaining the Secretary's approval of settlements under § 908(i)(A), but inserted that prerequisite in new § 908(i)(B) for claims involving medical benefits. *See Marine Concrete, supra,* 645 F.2d at 486. Section 914(j), 33 U.S.C., which allows deputy commissioners in specified

instances to discharge an employer's liability upon payment of a lump sum, also requires deputy commissioners to obtain the Secretary's approval. This brief glimpse into legislative history tells us two things. First, when the "power, duties, and responsibilities" of the deputy commissioners with respect to hearings were delegated to administrative law judges in 1972, the deputy commissioners did not have the independent authority to approve compromise settlements under § 908(i)(A). Their approval had to be accompanied by the approval of the Secretary. Second, the caution with which Congress has granted any authority to approve settlements suggests that so radical a change as delegating that responsibility to administrative law judges is likely to have been treated explicitly in the statute. *See* S.Rep.No.1988, 75th Cong., 3d Sess. 6 (1938).

Furthermore, the APA does not confer the power to approve settlements on administrative law judges in LHWCA proceedings. Ingalls and Bethlehem Steel as amicus rely heavily on the "(n)otwithstanding any other provisions of this chapter" qualification in § 919(d). When we turn to the APA, however, we find similar qualifications. Section 556, 5 U.S.C., which sets out the powers and duties of hearing officers, specifically provides that those powers are "subject to the published rules of the agency." *See also* 5 U.S.C. § 554(c) (1).[14] The regulations

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[14] Section 554(c)(1) provides that the agency shall give interested parties opportunity for:

> (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment

promulgated under the LHWCA are perfectly consistent with the clear import of § 908(i)(A) for they clearly contemplate that only the deputy commissioner will approve agreed settlements under § 908(i)(A). 20 C.F.R. § 702.241. We, therefore, conclude once again that "[t]he general provisions of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, . . . do not alter the later-enacted and more specific provisions of the LHWCA." *Marine Concrete, supra*, 645 F.2d at 487.

Even assuming that some ambiguity exists between the powers delegated in § 919(d) of the Act and the restrictions on settlement in § 908(i)(A), we find no support in the legislative history explaining § 908(i)(A) to justify an interpretation contrary to the plain meaning of the words used.[15] Too much ado has been made over a statement in the Senate and House Reports accompanying the 1972 Amendments, which, when read of context, suggests that Congress inadvertently said "deputy commissioner" when it meant "deputy commissioner, hearing officer, and court." The Committee on Labor and Public

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when time, *the nature of the proceedings, and the public interest permit.*

5 U.S.C. § 554(c)(1) (emphasis supplied). The italicized clause allows for the special situation presented here: where the particular agency statute provides for a limited, clearly defined procedure of settlement approval, the general provision of the APA will not supplant it.

[15] Turning at last to the legislative history underlying § 908(i)(A), we are mindful of the common sense rule "the plainer the language [of the statute], the more convincing contrary legislative history must be." *United States v. United States Steel Corp.*, 482 F.2d 439, 444 (7th Cir.), *cert. denied*, 414 U.S. 909, 94 S.Ct. 229, 38 L.Ed.2d 147 (1973).

Welfare in a section-by-section analysis of proposed bill S.2318, reported:

> Subsection 8(i)(A) provides that the *deputy commissioner, Board, or Court* may approve a settlement discharging an employer from liability for compensation if he deems it to be in the best interests of the employer.

S.Rep.No.92-1125, 92d Cong., 2d Sess. 26 (1972) (emphasis supplied). We noted this statement in *Marine Concrete* suggesting that it supported "the proposition that the ALJ has authority to approve settlements under Subsection A," *Marine Concrete, supra*, 645 F.2d at 486 n.2, and therefore, it is perhaps the fault of this Court that the parties have expended an undue amount of time and energy discussing the effect of the statement on the decision at hand. We hope our decision today will eliminate any confusion that has arisen over the legislative history of § 908(i)(A). The irrelevance of this committee comment to the issue presented is immediately, and painfully, apparent upon turning to the section in the report that sets out proposed bill S.2318. The analysis in the report refers to a proposed statutory section that explicitly allows either "the deputy commissioner or hearing officer or Board or court" to approve agreed settlement. S.Rep.No.92-1125, 92d Cong., 2d Sess. 38 (1972). This version of the proposed bill was not the final form adopted by both Houses. 33 U.S.C. § 908(i)(A); S.2318, 92d Cong., 2d Sess., 118 Cong.Rec. 36,390 (1972); H.R. 12,006, 92d Cong., 2d Sess., 118 Cong.Rec. 36,376 (1972). That Congress omitted "Board or court" from the final version of the bill suggests even more strongly that it

intended to limit the power of settlement approval under § 908(i)(A) to deputy commissioners.

We have discovered nothing apart from this one statement in the committee reports referring to an earlier version of the amendments to suggest that § 908(i)(A) does not mean exactly what it says. "Congress has put down its pen, and [the Court] can neither rewrite Congress' words nor call it back 'to cancel half a line.'" *Director, Office of Workers' Compensation Programs v. Rasmussen*, 440 U.S. 29, 47, 99 S.Ct. 903, 913, 59 L.Ed.2d 122, 135 (1979). We hold accordingly. When the parties to proceedings under the LHWCA find that they can agree to a settlement of the compensation claim after the case has been referred to an ALJ, the ALJ must remand the case to the deputy commissioner for ultimate approval of the settlement. While we find no language in the Act that would prevent an ALJ from recommending a settlement, only deputy commissioners can approve agreed settlements under § 908(i)(A).

Though this result may impede "judicial efficiency, *see Clefstad, supra*, 9 BRBS at 222, to a slight extent, it is consistent with the policies underlying the LHWCA which overshadow the usual tendency of the courts to encourage the settlement of claims. When Congress first amended the LHWCA to afford interested parties the opportunity to reach a settlement agreement, it did so with caution: "Experience, however, warns against lump-sum payments merely as a convenience in disposing [of LHWCA claims]. Large payments of compensation are in most cases soon dissipated, or improvidently or foolishly invested, leaving the employee an early dependent upon charity." S.Rep.No.1988, 75th Cong., 3d Sess. 6 (1938). *See*

also A. Larson, The Law of Workmen's Compensation § 82.41 (1976). The speed with which settlements are brought about is, therefore, of less importance than assurance that the settlement is in the claimant's best interest. Insofar as our ruling today imposes another check on the agreed resolution of claims, it furthers the Act's conservative approach to settlement approval.[16]

V. CONCLUSION

Asserting jurisdiction under the *Gillespie* exception to the final judgment rule, we decide today that the Director, Office of Workers' Compensation Programs, is the appropriate party-respondent under Fed.R.App.P. 15(a), and therefore, that he has standing to respond to Ingalls' petition for review in this Court under § 921(c). We also conclude that 20 C.F.R. § 801.2(a)(10) is a reasonable and valid construction of "party in interest" as it is used in § 921(b)(3), and thus we affirm the Board's finding that the Director was entitled to petition for review of the order approving settlement. Finally, this Court holds that administrative law judges do not have the authority to approve lump-sum settlements under 33 U.S.C. § 908(i)(A). For this reason, we reverse and remand to the Benefits Review Board for proceedings consistent with this opinion.

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[16] Because we find that administrative law judges lack the authority to approve lump sum settlements, we do not reach the question of whether the ALJ below considered the proposed settlement in accordance with the criteria set out by the Board in *Clefstad, supra*, 9 BRBS at 222.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

I. T. O. CORPORATION OF BALTIMORE, Employer, and Liberty Mutual Insurance Company, Carrier, Petitioners,

v.

BENEFITS REVIEW BOARD, U. S. DEPARTMENT OF LABOR, Respondent,

William T. Adkins, Respondent,

International Longshoremen's Association, Amicus Curiae.

MARITIME TERMINALS, INC., and Aetna Casualty and Surety Co., Petitioners,

v.

SECRETARY OF LABOR, and Donald D. Brown, Respondents.

MARITIME TERMINALS, INC., and Aetna Casualty and Surety Co., Petitioners,

v.

Vernie Lee HARRIS, and United States Department of Labor, Respondents.

NATIONAL ASSOCIATION OF STEVEDORES et al., Petitioners,

v.

BENEFITS REVIEW BOARD, U. S. DEPT. OF LABOR, Respondent,

William T. Adkins, Respondent.

Nos. 75-1051, 75-1075, 75-1196 and 75-1088.

United States Court of Appeals,
Fourth Circuit.

Argued May 4, 1976.

Decided Aug. 26, 1976.

David R. Owen, Baltimore, Md. (Francis J. Gorman, Semmes, Bowen & Semmes, Baltimore, Md., on brief), for Liberty Mut. Ins. Co.

John B. King, Jr., Norfolk, Va. (Vandeventer, Black, Meredith & Martin, Norfolk, Va., on brief), for Maritime Terminals and Aetna Cas. and Surety Co.

Donald A. Krach, Baltimore, Md. (William C. Stifler, III, Paul B. Lang, Niles, Barton & Wilmer, Baltimore, Md., Thomas D. Wilcox, Washington, D. C., on brief), for Nat. Ass'n of Stevedores.

Linda L. Carroll, Atty., Washington, D. C. (William J. Kilberg, Sol. of Labor, Marshall H. Harris, Associate Sol., George M. Lilly, Karen L. Gilbert, Attys., U. S. Dept. of Labor, Washington, D. C., on brief), Amos I. Meyers, Baltimore, Md. (Terry Paul Meyers, Baltimore, Md., on brief), Charles S. Montagna, Norfolk, Va., for respondents.

Thomas W. Gleason, Jr., New York City (Herzl S. Eisenstadt, Richard H. Kapp, New York City, on brief), for International Longshoremen's Ass'n, AFL-CIO as amicus curiae.

Before HAYNSWORTH, Chief Judge, and WINTER, CRAVEN, BUTZNER, RUSSELL and WIDENER, Circuit Judges, in banc.

WINTER, Circuit Judge:

These consolidated appeals present two major questions: (1) the extent of coverage of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (sometimes "LHWCA"), to persons engaged in the necessary steps in the overall process of loading and unloading a vessel but who, prior to the Amendments, could claim benefits for accidental injury or death, sustained in the process, only under state law; and (2) whether, in a petition for review under 33 U.S.C. § 921(c), the Director, Office of Workers' Compensation Programs, Department of Labor, is a proper respondent. The appeals were first heard and decided by a divided panel of the court. *I. T. O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080 (4 Cir. 1975). Chief Judge Haynsworth and I, comprising the majority, held that during the loading and unloading process the coverage of the Act extended to the first (last) point of rest. As applied to the facts, this holding resulted in the conclusion that none of the three claimants was entitled to benefits. Judge Craven was of a contrary view. He would have held that the three claimants were engaged in maritime employment on navigable waters of the United States, as defined in the Act, and hence they should be entitled to benefits under the Act for their accidental injuries. The panel was unanimous in deciding that the Director was not a proper respondent, although it was recognized that, in a proper case, he might be permitted to become an intervenor.

Because of the importance and novelty of the questions decided, the entire court granted cross-petitions for rehearing and reheard the appeals in banc. At the time

the appeals were reargued, the in banc court consisted of six judges.

I.

On the issue of the extent of the Act's coverage, Chief Judge Haynsworth, Judge Russell and I subscribe to the views expressed in the majority panel decision. Judge Widener subscribes to the principle expressed in that opinion, although he defines the exact point between coverage and non-coverage somewhat differently.

In his application of the principle, Judge Widener concludes that the claimant Adkins is not covered by the Act, but that claimants Brown and Harris are covered. He reasons that the test of coverage is whether an otherwise eligible employee is injured while engaged in loading or unloading a ship; coverage would not extend to activities for transshipment of goods removed from a ship or goods destined for a ship. In Adkins' case, a container was removed from the ship and stored in the marshaling area. From there the container was moved to a shed where it was stripped and the contents were stored. Adkins was injured when he was moving the contents from the storage area onto a waiting delivery truck. The cargo was no longer being unloaded from the ship but was in the process of being loaded into a delivery truck. Adkins, in Judge Widener's view, was thus not covered because he was not participating in the unloading process; he was handling the goods for transshipment. Accordingly, Judge Widener concurs in the judgment of Chief Judge Haynsworth, Judge Russell and me to reverse Adkins' award.

In Brown's case, the cargo was brought from somewhere inland and deposited in a warehouse. Brown, operating a forklift, picked up cargo and stuffed it into a container. While stuffing the container, Brown was injured. When the stuffing would have been completed, a hustler would have carried the container to the marshaling area, and from there the container would have been taken to the pier to be loaded on board. Thus, in Judge Widener's view, Brown was engaged in the overall process of loading the ship. The cargo was not merely being moved to storage for convenience or facility; the cargo was in the process of being loaded on board ship, and Brown was engaged in the loading process. Accordingly, Judge Widener concurs in the judgment of Judge Craven and Judge Butzner to sustain the award made to Brown.

Harris was a hustler who was injured while he was taking a container, stuffed with goods which had been stored after inland delivery, from the stuffing area to the marshaling area. From the marshaling area, the container would have been taken to the pier where it would have been loaded on board. The goods were being moved solely for loading purposes, not for mere convenience, and therefore, in Judge Widener's view, Harris, like Brown, was engaged in the overall process of loading the ship. Accordingly, Judge Widener concurs in the judgment of Judge Craven and Judge Butzner to sustain the award made to Harris.

Judge Craven and Judge Butzner subscribe to the views expressed by Judge Craven in his dissenting panel opinion, and for those reasons and the additional reasons expressed by Judge Butzner in his separate opinion

attached hereto, they vote to affirm the awards made to Adkins, Brown and Harris.

By the majority votes of Chief Judge Haynsworth, Judge Russell, Judge Widener and me, the award to Adkins (Nos. 75-1051 and 75-1088) is reversed. By an equally divided court, the awards to Brown and Harris (Nos. 75-1075 and 75-1196) are affirmed.

II.

On the issue of whether the director is a proper respondent, an issue raised only in Nos. 75-1051 and 75-1088, Chief Judge Haynsworth, Judge Russell, Judge Widener and I subscribe to the views expressed in the majority panel decision as hereafter amplified. Judge Craven and Judge Butzner subscribe to the views expressed in Judge Butzner's separate opinion attached hereto.

III.

Chief Judge Haynsworth, Judge Russell, Judge Widener and I amplify our conclusion that the Director is not a proper respondent as follows:

Prior to the 1972 Amendments, the Act provided for judicial review by an injunction suit against the deputy commissioner making a compensation award. The pertinent part of 33 U.S.C. § 921(b) (1970), as amended, 33 U.S.C. § 921(c) (1976 Supp.), provided:

> If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in

> interest against the deputy commissioner making the order, and instituted in . . . the judicial district in which the injury occurred . . . .

One of the 1972 Amendments revised § 921 so that subsection (c), the counterpart of the previous subsection (b), now provides:

> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the circuit in which the injury occurred, by filing in such court . . . a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted . . . to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings . . . .

Certainly the deputy director was a party to pre-1972 litigation, but neither he nor his counterparts is expressly designated as a party by the 1972 Amendments. The legislative history is unenlightening as to the reason for this omission. While it is true that old § 921a[1] provided

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[1] 33 U.S.C. § 921a, *as amended*, 33 U.S.C. § 921a (1976 Supp.):

> In any court proceedings under section 921 of this title or other provisions of this chapter, it shall be the duty of the United States attorney in the judicial district in which the case is pending to appear as attorney or counsel on behalf of the Secretary of Labor or his deputy commissioner when either is a party to the case or interested, and to represent such Secretary or deputy in any court in which such case may be carried on appeal.

that the United States Attorney would represent the Secretary or the Deputy Commissioner in any court proceedings under old § 921, and that § 921a was continued by the 1972 Amendments although modified to permit the Secretary to appoint his own counsel,[2] the legislative history is again unenlightening. To conclude from the mere existence of new § 921a that the Secretary, or his designee, the Director, is automatically a party to a review proceeding is to beg the question. This section's existence can as well mean only that if otherwise made a party, *e. g.*, by intervention in a review proceeding, the Secretary or Director will be represented by attorneys appointed by him.

Indeed, § 939(c)(1), added by the 1972 Amendments, suggests the latter reading. It provides that "(t)he Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim." It would be a redundancy for the Secretary to be authorized to provide legal services to a prevailing claimant if the Secretary himself was intended actively to litigate to sustain an award.[3] Thus, unlike the pre-1972 Act and

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[2] 33 U.S.C. § 921a (1976 Supp.):

> Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

[3] We fail to understand how the Director's statutory duty to provide legal assistance to claimants confers upon him a stake in the proceedings independent of that of any claimant, as apparently urged by the dissent. The issue we confront is not whether the Director may appear before us as Adkins' representative, but whether the Director may participate in his own behalf.

We also note that we find nothing in the statute or its legislative history to indicate that the availability of legal assistance to claimants may be made to turn upon whether the Director agrees or disagrees with the decision which a claimant seeks to appeal, as the dissent appears to suggest, *infra*, at p. 909 ("*If he deems the decision erroneous*, his statutory duty to assist the claimant includes seeking review.").

numerous other laws providing for judicial review or orders of administrative agencies,[4] the LHWCA, as

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[4] Most other statutes providing for judicial review of agency action are simply not analogous to the LHWCA because under them true adversity exists between the claimant of a *government* benefit and the government agency which seeks to withhold it. Thus, when review of agency action is sought by an unsuccessful applicant for a license before the FCC, *see* 47 U.S.C. § 402, or an unsuccessful applicant for a rate increase before the FPC, *see* 16 U.S.C. § 8251(b), or an unsuccessful claimant for Supplemental Security Income before the Secretary of H.E.W., *see* 42 U.S.C. §§ 405(b), 1383(c)(3), *it* is clear that the agency must be named a respondent since it is the party against whom relief is sought; the court could not grant an effective remedy without its presence. (Conversely, these agencies would never have reason to seek review of their own decisions.) In LHWCA cases, on the other hand, it is the private employer or insurance carrier which will have to pay any award which may be entered.

The Labor Management Relations Act is more nearly similar to the LHWCA, since under it, as under the LHWCA, disputes are adjudicated between antagonistic private parties. And the NLRB may be called upon to defend its decisions in court. *See* 29 U.S.C. § 160(f). However, the NLRB's status as a party in the courts of appeals derives from its enforcement powers. *See id.* ("Upon the filing of such petition [for review], the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section [granting the Board power to enforce its decisions in court], and shall have the same jurisdiction . . . to make and enter a decree enforcing,

amended in 1972, does not on its face make the Director a respondent to a petition to review under § 921(c).

Since the Act is not specific, it follows that, if the Director is to be a party, he must be a "person adversely affected or aggrieved by a final order of the Board" within the meaning of § 921(c). Whether he is or is not is a question closely akin to the issue of whether the "case or controversy" requirement of Article III of the Constitution has been met.

Generally, to be adversely affected or aggrieved under the statute or to present a case or controversy under the Constitution, one must have suffered "injury in fact, economic or otherwise." *See* K. Davis, Administrative Law (1970 Supp.) § 22.00-1 at 706; 3 *id.* § 22.02. Therefore, to be a party before this court, the Director must have some concrete stake in the outcome of the case.

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modifying . . . or setting aside in whole or in part the order of the Board"). Thus, like the FCC, the FPC, the Secretary of H.E.W. and other agencies, the NLRB is an adverse party in court because adjudication is being sought of *its* right to grant relief in behalf of the prevailing party before it. The Director, Office of Workmen's Compensation Programs has no enforcement powers comparable to those of the NLRB.

Moreover, it is not the decision of the *Director* which is called into question by a petition for review under 33 U.S.C. § 921(c), but that of the Benefits Review Board. Thus, the Director does not possess even a concrete interest in defending his *own* decision in court, as does, for example, a district judge against whom a writ of mandamus is sought. As we noted in the majority panel opinion, the Benefits Review Board has specifically asked that it *not* be denominated a party respondent in these proceedings. To that request, we acceded.

The Director asserts he has the requisite stake because

> [h]e is directly affected in his official capacity by the correctness of the Board's decision involving the proper scope of coverage of the Act with whose administration he is charged as the designee of the Secretary of Labor.

The Secretary of Labor's administrative duties, delegated to the Director, *see* 20 C.F.R. § 701.202, are set out in 33 U.S.C. § 939. Subsection (c)(1) is most arguably relevant to the Director's stake in the Board's decisions:

> The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation and including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

But we do not think that these duties provide the requisite stake. They do not confer upon the Director any specific interest in the proper administration of the Act.

In *United States ex rel. Chapman v. F. P. C.*, 191 F.2d 796, 799-800 (4 Cir. 1951), *rev'd*, 345 U.S. 153, 73 S.Ct. 609, 97 L.Ed. 918 (1953), we held that the Secretary of the Interior lacked standing to challenge an order granting a license to a private company to construct a dam. The Secretary claimed to be affected by the order because it was his statutory duty to market surplus electrical power

from publicly constructed dams. The Supreme Court reversed without opinion on this point, upholding standing. 345 U.S. at 156. *See* 3 K. Davis, supra, § 22.15 at 280.

The Director asserts that *Chapman* supports his position before us, but we disagree. The Secretary of the Interior in *Chapman did* have some stake in the outcome: it would have been harder for him to market public power if another private dam was built. Alternatively, if the private project was disapproved, it would have been more likely that a public dam would eventually have been built, in which case the Secretary would have had more power to market. Thus, regardless of whether the Secretary was faced with a surplus or a shortage of electrical power to market under his statutory authority, the FPC's decision would directly affect him in the performance of his marketing obligations. The Director in this case has no such specific interest. Therefore, we read *Chapman* to suggest that the Director does not have a stake in the outcome and cannot be a party.

The lack of a stake in the outcome on the part of the Director would appear to end our inquiry. The Director argues, however, that because he is a party to proceedings before the Board, 20 C.F.R. § 801.2(10), it would be anomalous if he were not a party before this court. There are several answers to this argument. First, of course, that the Director is a party to proceedings before the Board does not alter the fact that he has no direct stake in the outcome of the case, is not a person aggrieved by Board action and is thus without a case or controversy to assert. Second, the fact that one is permitted to be a party to administrative proceedings does not require that one be

entitled to initiate judicial review of those proceedings:[5] in the former case, the participant may perform a useful role by calling to the administrative agency's attention considerations it could not on its own initiative, much in the way that an intervenor would in this court; in the latter situation, however, the hopeful party is seeking to initiate a new level of proceedings because of dissatisfaction with the result below. *See* 3 K. Davis, supra, § 22.08 at 242.

Finally, it would appear even from the regulations implementing the Act that the Director is not *automatically* to be a party in this court, even though he is automatically a party before the Board. In 20 C.F.R. § 801.2(10), "party" is defined as follows: "the Secretary or his designee *and* any person or business entity aggrieved or directly affected by the decision or order from which an appeal to the Board is taken." (Emphasis

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[5] While the Director here seeks to be named a *respondent* to a petition for review, a holding that he is a "person aggrieved" whose presence insures proper adversity would necessarily lead to the conclusion that he is entitled to petition for review of a decision of the Benefits Review Board of which he disapproves: if the Director has an interest in sustaining a Board decision with which he agrees, then he also has an interest in overturning a decision with which he disagrees. We would not readily subject the LHWCA to a construction under which the official charged with administering the Act could invoke the aid of the federal courts to reverse the decision of the board responsible for adjudicating claims under the Act. The unfairness of such a result is manifest if one contemplates the possibility that in some future case the Director, in furtherance of his asserted interest in determining "the proper scope of coverage of the Act," might seek to reverse an award to a claimant on the ground that the Board had been too generous.

added.) However, 20 C.F.R. § 802.410 provides: "any *party* adversely affected or aggrieved by such decision [of the Board] may take an appeal to the U.S. Court of Appeals . . . . " (Emphasis added.) Thus, the Secretary is a "party" before the Board even if he is not "aggrieved"; but to be entitled to participate in court proceedings, the Secretary, although a "party" below, must, like any other "party," be adversely affected.

In summary, we stand firm in our conclusion that the Director is not automatically a respondent in a review proceeding under § 921(c).

In our earlier opinion, we added that we did not decide that "a court of appeals may not, in a proper case, permit intervention by others [including the Director] who have an interest at stake . . . . " We elaborate on that comment: The Director unquestionably has a right to seek to intervene under Rule 24(b) Fed.R.Civ.P.,[6] and an application will ordinarily be granted. *See* 3B J. Moore, Federal Practice ¶ 24.10[5]; 7A C. Wright & A. Miller, Federal Practice and Procedure § 1912. The Director has not, however, sought intervention in these cases. We assume that he has not done so because he does not wish to render moot his assertion that such a request on his part is unnecessary. Having decided that such a request is necessary, we will still consider such a request on his part should he be advised to make it.

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[6] The Federal Rules of Civil Procedure principally govern procedure in the United States district courts in suits of a civil nature, Rule 1, but Rule 81(c) makes them applicable also to review proceedings under the Act to the extent that the Act does not prescribe procedure.

Nos. 75-1051 and 75-1088 – REVERSED.

Nos. 75-1075 and 75-1196 – AFFIRMED. *Each Party to Pay His Own Costs.*

BUTZNER, Circuit Judge (dissenting):

I

I believe that the Director, Office of Workmen's Compensation Programs, should be recognized as a party to these proceedings. This issue raises a simple question of statutory construction. In 33 U.S.C. § 939(c), Congress authorized the Secretary of Labor to assist claimants and to provide them legal assistance. This statute must be read along with 33 U.S.C. § 921(a), which provides that attorneys appointed by the Secretary shall represent him before the courts of appeals. The Secretary has properly delegated his responsibilities to the Director.

Regulations under the Act establish the Director as a party before the Benefits Review Board. 20 C.F.R. § 801.3(10). His stake in the proceedings arises out of the duty imposed by 33 U.S.C. § 939(c)(1) to assist claimants. Thus, the Director, like any other party before the Board, is aggrieved within the meaning of 33 U.S.C. § 921(c) by an adverse decision of the Board. If he deems the decision erroneous, his statutory duty to assist the claimant includes seeking review. If the decision favors the claimant, the statute authorizes the Director to support the award on review.

In sum, the Act expressly places on the Secretary or his designee, the Director – not upon the courts of appeals – the responsibility of determining when the

Director should participate in the review of the Board's orders. Congress did not condition the Director's appearance in our court on our granting or withholding permission.

The difference between the Director's status as a permissive intervenor and as a party is more than a technical nicety. The majority rule, as I see it, will create roadblocks to filing petitions for review and certiorari, and it will provoke extended litigation over whether the Director's position in a given case satisfies the requirements of Rule 24(b). Other circuits have wisely recognized the Director's status as a party. *See, e. g., Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35 (2d Cir. 1976); *McCord v. Cephas,* 532 F.2d 1377 (D.C.Cir. 1975). I am not persuaded that we should differ from their sound conclusions.

II

I fully agree with Judge Craven that the point of rest theory espoused by the majority of the court is a judicial gloss on the 1972 Amendments of the Longshoremen's and Harbor Workers' Compensation Act, which is warranted by neither the Act nor its legislative history. *See I. T. O. Corp. v. Benefits Review Board,* 529 F.2d 1080, 1089 (4th Cir. 1975) (Craven, J., dissenting). I add only these brief observations. A careful study of the majority opinion filed when this case was heard by a panel, *I. T. O. Corp.,* 529 F.2d at 1081, discloses that the effect of the point of rest theory is to deprive longshoremen of coverage under the Act when they are injured while stuffing or stripping a ship's containers at a marine terminal. The

slight modification of the theory in the majority's per curiam opinion alleviates some, but not all, of its harsh results. It does so, however, at the expense of adding the factor of lapse of time to the vague concept of place for determining the point of rest. Rational, uniform application of the court's theory to the myriad circumstances in which injuries occur will be most difficult.

Judge CRAVEN initially voted with the majority to deny the Director standing as a party to these proceedings. On en banc reconsideration, he is now persuaded otherwise, and concurs in Judge BUTZNER'S opinion.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, Petitioner

v

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, et al.

514 US ___, 131 L Ed 2d 160, 115 S Ct ___

[No. 93-1783]

Argued January 9, 1995. Decided March 21, 1995.

Decision: Director of Office of Workers' Compensation Programs held to lack standing under Longshore and Harbor Workers' Compensation Act (33 USCS § 921(c)) to appeal Benefits Review Board order denying compensation claim.

APPEARANCES OF COUNSEL

Beth S. Brinkmann argued the cause for petitioner.

Lawrence P. Postol argued the cause for respondents.

SYLLABUS BY REPORTER OF DECISIONS

The Director of the Labor Department's Office of Workers' Compensation Programs petitioned the Court of Appeals for review of a Benefits Review Board decision that, *inter alia*, denied Jackie Harcum full-disability compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA). Harcum did not seek review and, while not opposing the Director's pursuit of the action, expressly declined to intervene on his own

behalf in response to an inquiry by the court. Acting *sua sponte*, the court concluded that the Director lacked standing to appeal the benefits denial because she was not "adversely affected or aggrieved" thereby within the meaning of § 21(c) of the Act, 33 USC § 921(c) [33 USC § 921(c)].

Held: The Director is not "adversely affected or aggrieved" under § 921(c).

(a) Section 921(c) does not apply to an agency acting as a regulator or administrator under the statute. This is strongly suggested by the fact that, despite long use of the phrase "adversely affected or aggrieved" as a term of art to designate those who have standing to appeal a federal agency decision, no case has held that an agency, without benefit of specific authorization to appeal, falls within that designation; by the fact that the United States Code's general judicial review provision, 5 USC § 551(2) [5 USC § 551(2)], which employs the phrase "adversely affected or aggrieved," specifically excludes agencies from the category of persons covered; and by the clear evidence in the Code that when an agency in its governmental capacity *is* meant to have standing, Congress says so, see, *e.g.*, 29 USC §§ 660(a) and (b) [29 USCS §§ 660(a) and (b)]. While the text of a particular statute could make clear that "adversely affected or aggrieved" is being used in a peculiar sense, the Director points to no such text in the LHWCA.

(b) Neither of the categories of interest asserted by the Director demonstrates that "adversely affected or aggrieved" in this statute must have an extraordinary meaning. The Director's interest in ensuring adequate

payments to claimants is insufficient. Agencies do not automatically have standing to sue for actions that frustrate the purposes of their statutes; absent some clear and distinctive responsibility conferred upon the agency, an "adversely affected or aggrieved" judicial review provision leaves private interests (even those favored by public policy) to be vindicated by private parties. *Heckman v United States*, 224 US 413, 56 L Ed 820, 32 S Ct 424; *Moe v Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 US 463, 48 L Ed 2d 96, 96 S Ct 1634; *Pasadena City Bd. of Ed. v Spangler*, 427 US 424, 49 L Ed 2d 599, 96 S Ct 2697, 49 L Ed 2d 599; and *General Telephone Co. of Northwest v EEOC*, 446 US 318, 64 L Ed 2d 319, 100 S Ct 1698, distinguished. Also insufficient is the Director's asserted interest in fulfilling important administrative and enforcement responsibilities. She fails to identify any specific statutory duties that an erroneous Board ruling interferes with, reciting instead conjectural harms to abstract and remote concerns.

8 F.3d 175, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment.

OPINION OF THE COURT

Justice SCALIA delivered the opinion of the Court.

The question before us in this case is whether the Director of the Office of Workers' Compensation Programs in the United States Department of Labor has standing under § 921(c) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat. 1424, as amended, 33 USC § 901 *et seq.* [33 USCS §§ 901 *et seq.*], to seek judicial review of decisions by the Benefits Review Board that in the Director's view deny claimants compensation to which they are entitled.

I

On October 24, 1984, Jackie Harcum, an employee of respondent Newport News Shipbuilding and Dry Dock Co., was working in the bilge of a steam barge when a piece of metal grating fell and struck him in the lower back. His injury required surgery to remove a herniated disc, and caused prolonged disability. Respondent paid Harcum benefits under the LHWCA until he returned to light-duty work in April 1987. In November 1987, Harcum returned to his regular department under medical restrictions. He proved unable to perform essential tasks, however, and the company terminated his employment in May 1988. Harcum ultimately found work elsewhere, and started his new job in February 1989.

Harcum filed a claim for further benefits under the LHWCA. Respondent contested the claim, and the dispute was referred to an Administrative Law Judge (ALJ). One of the issues was whether Harcum was entitled to

benefits for total disability, or instead only for partial disability, from the date he stopped work for respondent until he began his new job. "Disability" under the LHWCA means "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 USC § 902(10) [33 USCS § 902(10)].

After a hearing on October 20, 1989, the ALJ determined that Harcum was partially, rather than totally, disabled when he left respondent's employ, and that he was therefore owed only partial-disability benefits for the interval of his unemployment. On appeal, the Benefits Review Board affirmed the ALJ's judgment, and also ruled that under 33 USC § 908(f) [33 USCS §§ 908(f)], the company was entitled to cease payments to Harcum after 104 weeks, after which time the LHWCA special fund would be liable for disbursements pursuant to § 944.

The Director petitioned the United States Court of Appeals for the Fourth Circuit for review of both aspects of the Board's ruling. Harcum did not seek review and, while not opposing the Director's pursuit of the action, expressly declined to intervene on his own behalf in response to an inquiry by the Court of Appeals. The Court of Appeals *sua sponte* raised the question whether the Director had standing to appeal the Board's order. 8 F.3d 175 (1993). It concluded that she did not have standing with regard to that aspect of the order denying Harcum's claim for full-disability compensation, since she was not "adversely affected or aggrieved" by that decision within the meaning of § 921(c) of the Act, 33

USC § 921(c) [33 USCS § 921(c)].[1] We granted the Director's petition for certiorari. 512 US ___, 129 L Ed 2d 936, 115 S Ct 41 (1994).

II

The LHWCA provides for compensation of workers injured or killed while employed on the navigable waters or adjoining, shipping-related land areas of the United States. 33 USC § 903 [33 USCS § 903]. With the exception of those duties imposed by §§ 919(d), 921(b), and 941, the Secretary of Labor has delegated all responsibilities of the Department with respect to administration of the LHWCA to the Director of the Office of Workers' Compensation Programs (OWCP). 20 CFR §§ 701.201 and 701.202 (1994); 52 Fed Reg 48466 (1987). For ease of exposition, the Director will hereinafter be referred to as the statutory recipient of those responsibilities.

A worker seeking compensation under the Act must file a claim with an OWCP district director. 33 USC § 919(a) [33 USCS § 919(a)]; 20 CFR §§ 701.301(a) and 702.105 (1994). If the district director cannot resolve the claim informally, 20 CFR § 702.311, it is referred to an ALJ authorized to issue a compensation order, § 702.316; 33 USC § 919(d) [33 USCS § 919(d)]. The ALJ's decision is reviewable by the Benefits Review Board, whose members are appointed by the Secretary. § 921(b)(1). The

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[1] The court found that, as administrator of the § 944 special fund, the Director did have standing to appeal the Board's decision to grant respondent relief under § 908(f). That ruling is not before us and we express no view upon it.

Board's decision is in turn appealable to a United States court of appeals, at the instance of "[a]ny person adversely affected or aggrieved by" the Board's order. § 921(c).

With regard to claims that proceed to ALJ hearings, the Act does not by its terms make the Director a party to the proceedings, or grant her authority to prosecute appeals to the Board, or thence to the federal court of appeals. The Director argues that she nonetheless had standing to petition the Fourth Circuit for review of the Board's order, because she is "a person adversely affected or aggrieved" under § 921(c). Specifically, she contends the Board's decision injures her because it impairs her ability to achieve the Act's purposes and to perform the administrative duties the Act prescribes.

The phrase "person adversely affected or aggrieved" is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts. *See, e.g.*, federal Communications Act of 1934, 47 USC § 402(b)(6) [47 USCS § 402(b)(6)]; Occupational Safety and Health Act of 1970, 29 USC § 660(a) [29 USCS § 660(a)]; Federal Mine Safety and Health Act of 1977, 30 USC § 816 [30 USCS § 816]. The terms "adversely affected" and "aggrieved," alone or in combination, have a long history in federal administrative law, dating back at least to the federal Communications Act of 1934, § 402(b)(2) (codified, as amended, 47 USC § 402(b)(6) [47 USCS § 402(b)(6)]). They were already familiar terms in 1946, when they were embodied within the judicial review provision of the Administrative Procedure Act (APA), 5 USC § 702 [5 USCS § 702], which entitles "[a] person . . . adversely affected or aggrieved by agency action within

the meaning of a relevant statute" to judicial review. In that provision, the qualification "within the meaning of a relevant statute" is not an addition to what "adversely affected or aggrieved" alone conveys; but is rather an acknowledgment of the fact that what *constitutes* adverse effect or aggrievement varies from statute to statute. As the US Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act (1947) put it, "The determination of who is 'adversely affected or aggrieved- . . . within the meaning of any relevant statute' has 'been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme.' " *Id.*, at 96 (citation omitted). We have thus interpreted § 702 as requiring a litigant to show, at the outset of the case, that he is injured in fact by agency action and that the interest he seeks to vindicate is arguably within the "zone of interests to be protected or regulated by the statute" in question. *Association of Data Processing Service Organizations, Inc. v Camp*, 397 US 150, 153, 25 L Ed 2d 184, 90 S Ct 827 (1970); *see also Clarke v Securities Industry Assn.*, 479 US 388, 395-396, 93 L Ed 2d 757, 107 S Ct 750 (1987).

Given the long lineage of the text in question, it is significant that counsel have cited to us no case, neither in this Court nor in the courts of appeals, neither under the APA nor under individual statutory-review provisions such as the present one, which holds that, without benefit of specific authorization to appeal, an agency, in its regulatory or policy-making capacity, is "adversely affected" or "aggrieved." *Cf. Director, Office of Workers' Compensation Programs v Perini North River Associates*, 459

US 297, 302-305, 74 L Ed 2d 465, 103 S Ct 634 (1983) (noting the issue of whether the Director has standing under § 921(c), but finding it unnecessary to reach the question).[2] There are cases in which an agency has been held to be adversely affected or aggrieved in what might be called its nongovernmental capacity – that is, in its capacity as a member of the market group that the statute was meant to protect. For example, in *United States v ICC*, 337 US 426, 93 L Ed 1451, 69 S Ct 1410 (1949), we held that the United States had standing to sue the Interstate Commerce Commission in federal court to overturn a Commission order that denied the Government recovery of damages for an allegedly unlawful railroad rate. The Government, we said, "is not less entitled than any other shipper to invoke administrative and judicial protection."

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[2] In addition to not reaching the § 921(c) question, Perini also took as a given (because it had been conceded below) the answer to another question: whether the Director (rather than the Benefits Review Board) is the proper party respondent to an appeal from the Board's determination. *See* 459 U.S., at 304, n 13, 74 L Ed 2d 465, 103 S Ct 634. Obviously, an agency's entitlement to party respondent status does not necessarily imply that agency's standing to appeal: The National Labor Relations Board, for example, is always the party respondent to an employer or employee appeal, but cannot initiate an appeal from its own determination. 29 USC §§ 152(1), 160(f) [29 USCS § 152(1) 160(f)]. Indeed, it can be argued, as an *amicus* in this case has done, that if the Director *is* the proper party respondent in the court of appeals (as her regulations assert, *see* 20 CFR § 802.410 (1994)), in initiating an appeal she would end up on both sides of the case. See Brief for Nat. Assn. of Waterfront Employers et al. as *Amici Curiae* 17, n 14. Our opinion today intimates no view on the party-respondent question.

Id., at 430, 93 L Ed 1451, 69 S Ct 1410.[3] But the status of the Government as a statutory beneficiary or market participant must be sharply distinguished from the status of the Government as regulator or administrator.

The latter status would be at issue if – to use an example that continues the ICC analogy – the Environmental Protection Agency sued to overturn an ICC order establishing high tariffs for the transportation of recyclable materials. Cf. *United States v Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 US 669, 37 L Ed 2d 254, 93 S Ct 2405 (1973). Or if the Department of Transportation, to further a policy of encouraging so-called "telecommuting" in order to reduce traffic congestion, sued as a "party aggrieved" under 28 USC § 2344 [28

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[3] *United States v ICC* accorded the United States standing despite the facts that (1) the Interstate Commerce Act contained no specific judicial review provision, and (2) the APA's general judicial review provision ("person adversely affected or aggrieved") excludes agencies from the definition of "person." See *infra*, at ___, 131 L Ed 2d, at 169. It would thus appear that an agency suing in what might be termed a nongovernmental capacity escapes that definitional limitation. The LHWCA likewise contains a definition of "person" that does not specifically include agencies. 33 USC § 902(1) [33 USCS § 902(1)]. We chose not to rely upon that provision in this opinion because it seemed more likely to sweep in the question of the Director's authority to appeal Board rulings that are adverse to the § 944 special fund, which deserves separate attention. It is possible that the Director's status as manager of the privately financed fund removes her from the "person" limitation, just as it may remove her from the more general limitation that agencies *qua* agencies are not "adversely affected or aggrieved." We leave those issues to be resolved in a case where the Director's relationship to the fund is immediately before us.

USCS § 2344], to reverse the Federal Communications Commission's approval of rate increases on second phone lines used for modems. We are aware of no case in which such a "policy interest" by an agency has sufficed to confer standing under an "adversely affected or aggrieved" statute or any other general review provision. To acknowledge the general adequacy of such an interest would put the federal courts into the regular business of deciding intrabranch and intraagency policy disputes – a role that would be most inappropriate.

That an agency in its governmental capacity is not "adversely affected or aggrieved" is strongly suggested, as well, by two aspects of the United States Code: First, the fact that the Code's general judicial review provision, contained in the APA, does not include agencies within the category of "person adversely affected or aggrieved." *See* 5 USC § 551(2) [5 USCS § 551(2)] (excepting agencies from the definition of "person"). Since, as we suggested in *United States v ICC*, the APA provision reflects "the general legislative pattern of administrative and judicial relationships," 337 US, at 433-434, 93 L Ed 1451, 69 S Ct 1410, it indicates that even under specific "adversely affected or aggrieved" statutes (there were a number extant when the APA was adopted) agencies as such normally do not have standing. And second, the United States Code displays throughout that when an agency in its governmental capacity *is* meant to have standing, Congress says so. The LHWCA's silence regarding the Secretary's ability to take an appeal is significant when laid beside other provisions of law. *See, e.g.*, Black Lung Benefits Act (BLBA), 30 USC § 932(k) [30 USCS § 932(k)] ("The Secretary shall be a party in any proceeding relative to [a]

claim for benefits"); Title VII of the Civil Rights Act of 1964, 42 USC § 2000e-5(f)(1) [42 USCS § 2000e-5(f)(1)] (authorizing the Attorney General to initiate civil actions against private employers) and § 2000e- 4(g)(6) (authorizing the Equal Employment Opportunities Commission to "intervene in a civil action brought . . . by an aggrieved party . . . "); Employee Retirement Income Security Act of 1974 (ERISA), 29 USC § 1132(a)(2) [29 USCS § 1132(a)(2).] (granting Secretary power to initiate various civil actions under the Act). It is particularly illuminating to compare the LHWCA with the Occupational Safety and Health Act of 1970 (OSHA), 29 USC § 651 *et seq.* [29 USCS §§ 651 *et seq.*]. Section 660(a) of OSHA is virtually identical to § 921(c): it allows "[a]ny person adversely affected or aggrieved" by an order of the Occupational Safety and Health Review Commission (a body distinct from the Secretary, as the Benefits Review Board is) to petition for review in the courts of appeals. OSHA, however, further contains a § 660(b), which expressly grants such petitioning authority to the Secretary – suggesting, of course, that the Secretary would *not* be considered "adversely affected or aggrieved" under § 660(a), and should not be considered so under § 921(c).

All of the foregoing indicates that the phrase "person adversely affected or aggrieved" does not refer to an agency acting in its governmental capacity. Of course the text of a particular statute could make clear that the phrase is being used in a peculiar sense. But the Director points to no such text in the LHWCA, and relies solely upon the mere existence and impairment of her governmental interest. If that alone could ever suffice to contradict the normal meaning of the phrase (which is

doubtful), it would have to be an interest of an extraordinary nature, extraordinarily impaired. As we proceed to discuss, that is not present here.

III

The LHWCA assigns four broad areas of responsibility to the Director: (1) supervising, administering, and making rules and regulations for calculation of benefits and processing of claims, 33 USC §§ 906, 908-910, 914, 919, 930, and 939 (2) [33 USCS § 906, 908-910, 914, 919, 930 ad 939(2)] supervising, administering, and making rules and regulations for provision of medical care to covered workers, § 907; (3) assisting claimants with processing claims and receiving medical and vocational rehabilitation, § 939(c); and (4) enforcing compensation orders and administering payments to and disbursements from the special fund established by the Act for the payment of certain benefits, §§ 921(d) and 944. The Director does not assert that the Board's decision hampers her performance of these express statutory responsibilities. She claims only two categories of interest that are affected, neither of which remotely suggests that she has authority to appeal Board determinations.

First, the Director claims that because the LHWCA "has many of the elements of social insurance, and as such is designed to promote the public interest," Brief for Petitioner 17, she has standing to "advance in federal court the public interest in ensuring adequate compensation payments to claimants," *id.*, at 18. It is doubtful, to begin with, that the goal of the LHWCA is simply the support of disabled workers. In fact, we have said that,

because "the LHWCA represents a compromise between the competing interests of disabled laborers and their employers," it "is not correct to interpret the Act as guaranteeing a completely adequate remedy for all covered disabilities." *Potomac Electric Power Co. v Director, Office of Workers' Compensation Programs*, 449 US 268, 282, 66 L Ed 2d 446, 101 S Ct 509 (1980). The LHWCA is a scheme for fair and efficient resolution of a class of private disputes, managed and arbitered by the Government. It represents a "quid pro quo *between employer and employee*. Employers relinquish certain legal rights which the law affords to them and so, in turn, do the employees." 1 M. Norris, The Law of Maritime Personal Injuries § 4.1, p 106 (4th ed 1990) (emphasis added).

But even assuming the single-minded, compensate-the-employee goal that the Director posits, there is nothing to suggest that the Director has been given authority to pursue that goal in the courts. Agencies do not automatically have standing to sue for actions that frustrate the purposes of their statutes. The Interior Department, being charged with the duty to "protect persons and property within areas of the National Park System," 16 USC § 1a-6(a) [16 USCS § 1a-6(a)], does not thereby have authority to intervene in suits for assault brought by campers; or (more precisely) to bring a suit for assault when the camper declines to do so. What the Director must establish here is such a clear and distinctive responsibility for employee compensation as to overcome the universal assumption that "person adversely affected or aggrieved" leaves private interests (even those favored by public policy) to be litigated by private parties. That we are unable to find. The Director is not the designated

champion of employees within this statutory scheme. To the contrary, one of her principal roles is to serve as the broker of informal settlements between employers and employees. 33 USC § 914(h) [33 USCS § 914(h)]. She is charged, moreover, with providing "information and assistance" regarding the program to *all* persons covered by the Act, including employers. §§ 902(1), 939(c). To be sure, she has discretion under § 939(c) to provide "legal assistance in processing a claim" if it is requested (a provision that is perhaps of little consequence, since the Act provides attorneys' fees to successful claimants, *see* § 928); but that authority, which is discretionary with her and contingent upon a request by the claimant, does not evidence the duty and power, when the claimant is satisfied with his award, to contest the award on her own.

The Director argues that her standing to pursue the public's interest in adequate compensation of claimants is supported by our decisions in *Heckman v United States*, 224 US 413, 56 L Ed 820, 32 S Ct 424 (1912), *Moe v Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 US 463, 48 L Ed 2d 96, 96 S Ct 1634 (1976), *Pasadena City Bd. of Ed. v Spangler*, 427 US 424, 49 L Ed 2d 599, 96 S Ct 2697 (1976), and *General Telephone Co. of Northwest v EEOC*, 446 US 318, 64 L Ed 2d 319, 100 S Ct 1698 (1980). Brief for Petitioner 18. None of those cases is apposite. *Heckman* and *Moe* pertain to the United States' standing to represent the interests of Indians; the former holds, see 224 US, at 437, 56 L Ed 820, 32 S Ct 424, and the latter indicates in dictum, see 425 US, at 474, n 13, 48 L Ed 2d 96, 96 S Ct 1634, that the Government's status as guardian confers standing. The third case, *Spangler, supra*, at 427, 49 L Ed 2d 599, 96 S Ct 2697, based standing of the

United States upon an explicit provision of Title IX of the Civil Rights Act authorizing suit, 42 USC § 2000h-2 [42 USCS § 2000h-2], and the last, *General Telephone Co., supra*, at 325, 64 L Ed 2d 319, 100 S Ct 1698, based standing of the Equal Employment Opportunity Commission upon a specific provision of Title VII of the Civil Rights Act authorizing suit, 42 USC § 2000e-5(f)(1) [42 USCS § 2000e-5(f)(1)]. Those two cases certainly establish that Congress *could* have conferred standing upon the Director without infringing Article III of the Constitution; but they do not at all establish that Congress did so. In fact, General Telephone Co. suggests just the opposite, since it describes how, prior to the 1972 amendment specifically giving the EEOC authority to sue, only the "aggrieved person" could bring suit, *even though* the EEOC *was* authorized to use " 'informal methods of conference, conciliation, and persuasion' " to eliminate unlawful employment practices, 446 US, at 325, 64 L Ed 2d 319, 100 S Ct 1698 – an authority similar to the Director's informal settlement authority here.

The second category of interest claimed to be affected by erroneous Board rulings is the Director's ability to fulfill "important administrative and enforcement responsibilities." Brief for Petitioner 18. The Director fails, however, to identify any specific statutory duties that an erroneous Board ruling interferes with, reciting instead conjectural harms to abstract and remote concerns. She contends, for example, that "incorrect claim determinations by the Board frustrate [her] duty to administer and enforce the statutory scheme in a uniform manner." *Id.*, at 18-19. But it is impossible to understand how a duty of uniform *administration* and *enforcement* by

the Director (presumably arising out of the prohibition of arbitrary action reflected in 5 USC § 706) [5 USCS § 706] hinges upon correct *adjudication* by someone else. The Director does not (and we think cannot) explain, for example, how an erroneous decision by the Board affects her ability to process the underlying claim, § 919, provide information and assistance regarding coverage, compensation, and procedures, § 939(c), enforce the final award, § 921(d), or perform any other required task in a "uniform" manner.

If the correctness of adjudications were essential to the Director's performance of her assigned duties, Congress would presumably have done what it has done with many other agencies: made adjudication *her* responsibility. In fact, however, it has taken pains to *remove* adjudication from her realm. The LHWCA Amendments of 1972, 86 Stat. 1251, assigned administration to the Director, 33 USC § 939(a) [33 USCS § 939(a)]; assigned initial adjudication to ALJ's, § 919(d); and created the Board to consider appeals from ALJ's, § 921. The assertion that proper adjudication is essential to proper performance of the Director's functions is quite simply contrary to the whole structure of the Act. To make an implausible argument even worse, the Director must acknowledge that her lack of control over the adjudicative process does not even deprive her of the power to resolve legal ambiguities in the statute. She retains the rulemaking power, *see* § 939(a), which means that if her problem with the present decision of the Board is that it has established an erroneous rule of law, *see Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc.*, 467 US 837, 81 L Ed 2d 694, 104 S Ct 2778 (1984), she has full power to alter that rule.

See Estate of Cowart v Nicklos Drilling Co., 505 US ___, ___, 120 L Ed 2d 379, 112 S Ct 258 (1992) ("The [Board] is not entitled to any special deference"). Her only possible complaint, then, is that she does not agree with the outcome of this particular case. The Director also claims that precluding her from seeking review of erroneous Board rulings "would reduce the incentive for employers to view the Director's informal resolution efforts as authoritative, because the employer could proceed to a higher level of review from which the Director could not appeal." Brief for Petitioner 19. This argument assumes that her informal resolution efforts are *supposed* to be "authoritative." We doubt that. The structure of the statute suggests that they are supposed to be facilitative – a service to both parties, rather than an imposition upon either of them. But even if the opposite were true, we doubt that the unlikely prospect that the Director will appeal *when the claimant does not* will have much of an impact upon whether the employer chooses to spurn the Director's settlement proposal and roll the dice before the Board. The statutory requirement of adverse effect or aggrievement must be based upon "something more than an ingenious academic exercise in the conceivable." *United States v SCRAP*, 412 US, at 688, 37 L Ed 2 254, 93 S Ct 2405.

The Director seeks to derive support for her position from Congress' later enactment of the BLBA in 1978, but it seems to us that the BLBA militates precisely *against* her position. The BLBA expressly provides that "[t]he Secretary shall be a party in any proceeding relative to a claim for benefits under this part." 30 USC § 932(k) [30

USCS § 932(k)]. The Director argues that since the Secretary is explicitly made a party under the BLBA, she must be meant to be a party under the LHWCA as well. That is not a form of reasoning we are familiar with. The normal conclusion one would derive from putting these statutes side by side is this: when, in a legislative scheme of this sort, Congress wants the Secretary to have standing, it says so.

Finally, the Director retreats to that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes, see, *e.g., Northeast Marine Terminal Co. v Caputo*, 432 US 249, 268, 53 L Ed 2d 320, 97 S Ct 2348 (1977). That principle may be invoked, in case of ambiguity, to find present rather than absent elements that are essential to operation of a legislative scheme; but it does not add features that will achieve the statutory "purposes" more effectively. Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means – and there is often a considerable legislative battle over what those means ought to be. The withholding of agency authority is as significant as the granting of it, and we have no right to play favorites between the two. Construing the LHWCA as liberally as can be, we cannot find that the Director is "adversely affected or aggrieved" within the meaning of § 921(c).

* * *

For these reasons, the judgment of the United States Court of Appeals for the Fourth Circuit is affirmed.

So ordered.

SEPARATE OPINION

Justice **Ginsburg**, concurring in the judgment.

The Court holds that the Director of the Office of Workers' Compensation Programs of the United States Department of Labor (OWCP) lacks standing under § 921(c) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 USC § 901 *et seq.* [33 USCS §§ 901 *et seq.*], to seek judicial review of LHWCA claim determinations. Before amendment of the LHWCA in 1972, the Act's administrator had authority to seek review of LHWCA claim determinations in the courts of appeals. The Court reads the 1972 amendments as divesting the Act's administrator of access to federal appellate tribunals formerly open to the administrator's petitions. The practical effect of the Court's ruling is to order a disparity between two compensatory schemes – the LHWCA and the Black Lung Benefits Act (BLBA), 83 Stat. 792, as amended, 30 USC § 901 *et seq.* [30 USCS §§ 901 *et seq.*] – measures that Congress intended to work in essentially the same way.

Significantly, however, the Court observes that our precedent "certainly establish[es] that Congress *could* have conferred standing upon the [OWCP] Director without infringing Article III of the Constitution." *Ante*, at ___, 131 L Ed 2d, at 172 (emphasis retained).[1] While I do not

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[1] In contrast, the Court of Appeals for the Fourth Circuit raised the standing issue in this case on its own motion because it feared that judicial review initiated by the Director would "strik[e] at the core of the constitutional limitations placed upon th[e] court by Article III of the Constitution." 8 F.3d 175, 180, n 1 (1993); see also *Director, OWCP v Perini North River Associates,*

challenge the Court's conclusion that the Director lacks standing under the amended Act, I write separately because I am convinced that Congress did not advert to the change – the withdrawal of the LHWCA administrator's access to judicial review – wrought by the 1972 LHWCA amendments. Since no Article III impediment stands in its way, Congress may speak the final word by determining whether and how to correct its apparent oversight.

I

Before the 1972 amendments to the LHWCA, the OWCP Director's predecessors as administrators of the Act, officials called OWCP deputy commissioners, adjudicated LHWCA claims in the first instance. 33 USC §§ 919, 923 (1970 ed) [33 USCS § 919, 923]; see *Kalaris v Donovan*, 697 F 2d 376, 381-382 (CADC), cert. denied, 462 US 1119, 77 L Ed 2d 1349, 103 S Ct 3088 (1983). A deputy commissioner's claim determination could be challenged in federal district court in an injunctive action against the deputy commissioner. 33 USC § 921(b) (1970 ed) [33 USCS § 921(b)]; see *Parker v Motor Boat Sales, Inc.*, 314 US 244, 245, 86 L Ed 184, 62 S Ct 221 (1941). As a defending party in district courts, the deputy commissioner could appeal adverse rulings to the courts of appeals pursuant to 28 USC § 1291 [28 USCS § 1291], even when no other party sought appeal. See *Henderson v Glens Falls Indemnity Co.*, 134 F 2d 320, 322 (CA5 1943) ("There are numerous cases

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459 US 297, 302-305, 74 L Ed 2d 465, 103 S Ct 634 (1983) (noting but not deciding Article III issue).

in which the deputy commissioner has appealed as the sole party, and his right to appeal has never been questioned.") (citing, *inter alia*, *Parker*, *supra*).

The 1972 LHWCA amendments shifted the deputy commissioners' adjudicatory authority to Department of Labor administrative law judges (ALJs). Although district directors – as deputy commissioners are now called[2] – are empowered to investigate LHWCA claims and attempt to resolve them informally, they must order a hearing before an ALJ upon a party's request. 33 USC § 919 [33 USCS § 919]. The 1972 amendments also replaced district court injunctive actions with appeals to the newly created Benefits Review Board. Just as the deputy commissioners were parties before district courts prior to 1972, the Director - as the Secretary's delegate – is a party before the Benefits Review Board under the current scheme. 20 CFR § 801.2(a)(10) (1994). Either the Director or another party may invoke Board review of an ALJ's decision. 33 USC § 921(b)(3) [33 USCS § 921(b)(3)]; 20 CFR §§ 801.102, 801.2(a)(10) (1994). As before the amendments, further review is available in the courts of appeals. 33 USC § 921(c) [33 USCS § 921(c)].

The Court holds that the LHWCA, as amended in 1972, does not entitle the Director to appeal Benefits Review Board decisions to the courts of appeals. Congress surely decided to transfer adjudicative functions from the deputy commissioners to ALJs, and from the district courts to the Benefits Review Board. But there is scant reason to believe that Congress consciously decided

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[2] 20 CFR §§ 701.301(a)(7), 702.105 (1994).

to strip the Act's administrator of authority that official once had to seek judicial review of claim determinations adverse to the administrator's position. In amending the LHWCA in 1972, Congress did not expressly address the standing of the Secretary of Labor or his delegate to petition for judicial review. Congress did use the standard phrase "person adversely affected or aggrieved" to describe proper petitioners to the courts of appeals. *See* 33 USC § 921(c) [33 USCS § 921(c)]. But it is doubtful that Congress comprehended the full impact of that phrase: Not only does it qualify employers and injured workers to seek judicial review but, as interpreted, it ordinarily disqualifies agencies acting in a governmental capacity from petitioning for court review.[3]

II

Congress' 1978 revision of the Black Lung Benefits Act (BLBA) reveals the judicial review design Congress ordered when it consciously attended to this matter. The 1978 BLBA amendments were adopted, in part, to keep adjudication of BLBA claims under the same procedural regime as the one Congress devised for LHWCA claims. In the 1978 BLBA prescriptions, Congress expressly provided for the party status of the OWCP Director. *See* 30 USC § 932(k) [30 USCS § 932(k)] ("The Secretary [of

[3] The law-presentation role OWCP's Director seeks to play might be compared with the role of an advocate general or *ministere public* in civil law proceedings. See generally M. Glendon, M. Gordon, & C. Osakwe, Comparative Legal Traditions 344 (2d ed. 1994); R. David, French Law 59 (1972).

Labor] shall be a party in any proceeding relative to a claim for [black lung] benefits.").

Congress enacted the BLBA in 1969 to afford compensation to coal miners and their survivors for death or disability caused by pneumoconiosis (black lung disease). See *Usery v Turner Elkhorn Mining Co.*, 428 US 1, 8, 49 L Ed 2d 752, 96 S Ct 2882 (1976). The BLBA generally adopts the claims adjudication scheme of the LHWCA. 30 USC § 932(a) [30 USCS § 932(a)]. Congress amended the BLBA in 1978 to clarify that the BLBA *continuously* incorporates LHWCA claim adjudication procedures. See § 7(a)(1), 92 Stat. 98 (amending BLBA to incorporate LHWCA "as it may be amended from time to time"); S.Rep. No. 95-209, p 18 (1977) (BLBA amendment "makes clear that any and all amendments to the [LHWCA]" are incorporated by the BLBA, including "the 1972 amendments relating to the use of Administrative Law Judges in claims adjudication").

In the context of assuring automatic application of LHWCA procedures to black lung claims, see H.R.Conf.Rep. No. 95-864, pp. 22-23 (1978), Congress added to the BLBA the provision for the Secretary of Labor's party status "in any proceeding relative to a claim for [black lung] benefits." See § 7(k), 92 Stat. 99. According to the Report of the Senate Committee on Human Resources:

> "Some question has arisen as to whether the adjudication procedures applicable to black lung claims incorporating various sections of the amended [LHWCA] confe[r] standing upon the Secretary of Labor or his designee to appear, present evidence, file appeals or respond to appeals filed with respect to the litigation and

> appeal of claims. *In establishing the [LHWCA] procedures it was the intent of this Committee to afford the Secretary the right to advance his views in the formal claims litigation context whether or not the Secretary had a direct financial interest in the outcome of the case.* The Secretary's interest as the officer charged with the responsibility for carrying forth the intent of Congress with respect to the [BLBA] should be deemed sufficient to confer standing on the Secretary or such designee of the Secretary who has the responsibility for the enforcement of the [BLBA], to actively participate in the adjudication of claims before the Administrative Law Judge, Benefits Review Board, and appropriate United States Courts." S.Rep. No. 95-209, *supra*, at 21-22 (emphasis added).

Even if this passage cannot force an uncommon reading of the LHWCA words "person adversely affected or aggrieved," see *ante*, at ___, 131 L Ed 2, at 170, it strongly indicates that Congress considered vital to sound administration of the Act the administrator's access to court review.

The Director has been a party before this Court in nine argued cases involving the LHWCA.[4] In two of these

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[4] *Director, OWCP v Greenwich Collieries*, 512 US ___, 129 L Ed 2d 221, 114 S Ct 2251 (1994); *Bath Iron Works Corp. v Director, OWCP*, 506 US ___, 121 L Ed 2d 619, 113 S Ct 692 (1993); *Estate of Cowart v Nicklos Drilling Co.*, 505 US ___, 120 L Ed 2d 379, 112 S Ct 2589 (1992); *Morrison-Knudsen Construction Co. v Director, OWCP*, 461 US 624, 76 L Ed 2d 194, 103 S Ct 2045 (1983); *Director, OWCP v Perini North River Associates*, 459 US 297, 74 L Ed 2d 465, 103 S Ct 634 (1983); *U.S. Industries/Federal Sheet Metal, Inc. v Director, OWCP*, 455 US 608, 71 L Ed 2d 495, 102 S Ct 1312 (1982); *Potomac Electric Power Co. v Director, OWCP*, 449 US 268, 66 L Ed 2d 446, 101 S Ct 509 (1980); *Director, OWCP v Rasmussen*, 440 US 29, 59 L Ed 2d 122, 99 S Ct 903 (1979); *Northeast Marine Terminal Co. v Caputo*, 432 US 249, 53 L Ed 2d 320, 97 S Ct 2348 (1977).

cases,[5] the Director was a petitioner in the court of appeals. As this string of cases indicates, the impact of the 1972 amendments on the Director's *statutory* standing generally escaped this Court's attention just as it apparently slipped from Congress' grasp.

III

In addition to the BLBA, four other Federal Acts incorporate the LHWCA's claim adjudication procedures. *See* Defense Base Act, 42 USC § 1651 [42 USCS § 1651]; District of Columbia Workmen's Compensation Act, 36 D.C.Code Ann. § 501 (1973);[6] Outer Continental Shelf Lands Act, 43 USC § 1333(b) [43 USCS § 1333(b); Employees of Nonappropriated Fund Instrumentalities Statute, 5 USC § 8171 [5 USCS § 8171]. Claims under the LHWCA, the BLBA, and these other Acts are handled by the same administrative actors: the OWCP Director, district directors, ALJs, and the Benefits Review Board. Because the same procedures generally apply in the administration of these benefits programs, common

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[5] *Morrison-Knudsen Construction Co., supra*; *Rasmussen, supra*. In neither of these cases did the Board's ruling affect the § 944 special fund. See *ante*, at ___, n 3, 131 L Ed 2d, at 168-169.

[6] This law "applies to all claims for injuries or deaths based on employment events that occurred prior to July 2[4], 1982, the effective date of the District of Columbia Workers' Compensation Act [36 D.C.Code Ann. § 36-301 *et seq.* (1981)]." 20 CFR § 701.101(b) (1994).

issues arise under the several programs. See, *e.g., Director, OWCP v Greenwich Collieries*, 512 US ___, ___, 129 L Ed 2d 221, 114 S Ct 2251 (1994) (invalidating "true doubt" burden of persuasion rule that Department of Labor ALJs applied in both LHWCA and BLBA claim adjudications).

Under the Court's holding, the Director can appeal the Benefits Review Board's resolution of a BLBA claim, but not the Board's resolution of an identical issue presented in a claim under the LHWCA or the other four Acts. I concur in the Court's judgment despite the disharmony it establishes and my conviction that Congress did not intend to put the administration of the BLBA and the LHWCA out of sync. Correcting a scrivener's error is within this Court's competence, see, *e.g., United States Nat. Bank of Ore. v Independent Ins. Agents of America, Inc.*, 508 US ___, 124 L Ed 2d 402, 113 S Ct 2173 (1993), but only Congress can correct larger oversights of the kind presented by the OWCP Director's petition.